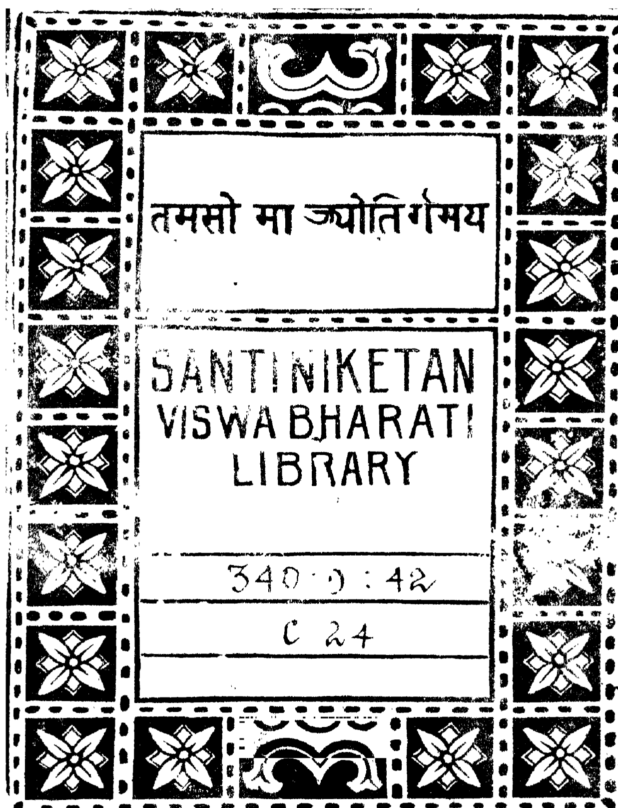


OUTLINES

OF

ENGLISH LEGAL HISTORY

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PREFACE

A YEAR ago it became my duty as one of the Readers to the Council of Legal Education, to deliver, at short notice, a course of lectures on Royal Justice in this country. The information which had to be gathered from many books, some out of print, others of great price, few to be found except in great libraries, I now place at the disposal of those who take, at the least, a passing interest in the subject.

Inaccuracies and inelegancies I am sure that I have not entirely avoided. If on some points I have spoken without certainty, it should be remembered that our information is not yet, and may never be, complete. On some topics, such as the Justices of the Forest and of the Jews, I have chosen to be silent and await the promised records of the Selden Society.

I desire here to acknowledge my great debt to the Rolls Series, the Acts of the Privy Council, and the invaluable volumes of the Selden Society. To none of the learned editors of that Series do I owe more than to Professor Maitland, to whom all scholars must wish complete restoration to health, and whose unwearied energy has illumined so many dark places of the law.

I have availed myself freely of the works, amongst others, of the Bishop of Oxford, my colleague Mr. Jenks, Mr. Bigelow, Mr. Pike, Sir F. Palgrave, Sir James Stephen, and a volume of essays contributed by Messrs. Henry Adams, Cabot Lodge, Young, and Laughlin.

To Sir William Anson and Mr. Paley Baildon I am beholden for valuable suggestion and criticism, and to any one who will trouble himself to point any of my mistakes out to me I offer my grateful thanks.

A. T. C.

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CHAPTER I

THE STATE, THE KING, AND JUSTICE

On November 16, 1818, a remarkable scene occurred in the Court of King's Bench. Abraham Thornton had been tried at Warwick for the murder of Mary Ashford, and had been duly acquitted. Her brother, William Ashford, then 'appealed' Thornton in the King's Bench for the murder. The appellee, being brought into Court, pleaded as follows: 'Not guilty. And I am ready to defend the same by my body.' And thereon taking his glove, he threw it upon the floor of the Court, meaning thereby that he was ready to defend himself by battle. The appellant objected, but the Court held that the appellee had a right to wage his body, unless circumstances plainly inconsistent with his innocence appeared; and such did not appear on the pleadings. The appellant was not prepared to do battle, and the appeal was dismissed. As a consequence the Statute 59 Geo. III, ch. 46 was passed, which abolished 'appeals' in criminal cases. This incident, now only eighty years old, carries us back to the times of our ancestor Primitive Man, who when he conceived himself offended, went out to adjust his differences with his bow and his spear; and is referable to the private desire for vengeance, which was the source, and is still, some say, the strength of the criminal law. Primitive Society.

It is only of late that the industry of scholars, of which we fortunately reap the fruits, has indicated the steps by

which man has progressed from the primitive or patriarchal stage to our present measure of civilization. Prior to the Norman Conquest, it is agreed by the best authorities that the law of this country was pure Teutonic, and so while the records of Anglo-Saxon times are scanty, we are enabled, thanks to the labours of men like Mr. Jenks[1], by observing those Teutonic laws and customs, which we now know prevailed on the continent of Europe, to supply much of what is wanting in the history of our own institutions.

The Family, the Clan, and the State.

It has always been a matter of difficulty to describe with precision and confidence the long process which converts a family into a State. That the clan is a development of the family has been generally admitted by scholars and anthropologists, who agree in recognizing that the family resembles the clan in this important particular, that they both depend for their cohesion upon the same principle of the common ancestor and the common blood. This principle, however, is not necessary to the life of the State; hence, as the further development unquestionably occurred, it has become a matter of consequence to discover why it occurred. It has been suggested with great cogency that War is the occasion and cause of the development. Those clans which combine successfully survive; those clans which fail to combine disappear. The suggestion is simple and attractive, it conforms to the law which proclaims the survival of the fittest, and it has some evidence to support it. We read that in the time of Tacitus, the Germanic peoples were divided on the clan system, and the historian fortunately gives the names amongst others of the Chauci and Cherusci. In the three centuries after Tacitus wrote, we find that these clans have disappeared in new groups, these groups being known as Franks, Saxons, and Alamanni, and that the Saxon group includes the Chauci and the Cherusci. It is quite possible that in the legendary story of Romulus dividing the Romans

[1] *Law and Politics in the Middle Ages*, by E. Jenks.

into the three tribes of Ramnes, Tities, and Luceres, we have the order of events reversed, and that the Hero owed his eminence to the amalgamation of the three blood groups.

For as the instinct of self-preservation produces combination, so it demands that the combination shall be efficiently led. The league produces the *Heretoch* or the host leader[1], the war lord or king. Thus on the continent, Prince Hugh was chosen by the Frank, Burgundian, and Aquitanian princes gathered together, to be a leader in war against the Huns, who, 'drunk with slaughter, rapine and all kinds of cruelty, poured themselves over the Gauls[2].' And in the history of the children of Israel we know that 'the Judges' were elected in times of great stress to deal with the enemy; and that when Saul was elected king, the people said, 'We will have a king over us that we also may be like all the nations, and that our king may judge us and go out before us and fight our battles.' One cannot help observing that Samuel in his warning to the people sketched out in a remarkable manner a conception of a feudal monarchy[3]. A king being, it is suggested, primarily selected to deal with external foes went on to deal with internal disorder—Saul's commission we notice is twofold—thereby anticipating the view advanced by Mr. Herbert Spencer, when he says that the true function of the State is to protect against external enemies and to suppress internal anarchy. The military character of the kingship should be borne in mind, because it has, it is conceived, produced several remarkable results to which we shall presently advert.

The kingly office; its military character.

Following the accounts of early writers, we find that the patriarchal or primitive man, if he suffered injury, took his revenge as well as he could. If he was slain his relatives took indiscriminate vengeance on all who were supposed to be connected with the murder or with the murderer. A distinct

The Blood Feud.

[1] Cf. the quotation from Baeda, *Hist. Eccl.*, v. 10, on the custom of the Saxons, 'ingruente belli articulo.' Stubbs, *Sel. Ch.*, p. 59.

[2] Jenks, cc. 1–4.

[3] 1 Sam. viii.

advance is made when it is recognized that the right of vengeance belongs properly only to a limited circle of the relatives of the dead man, and that retribution can only properly be exacted from a limited circle of the relatives of the offender. This is the stage of what is called 'the blood feud,' and is to be found even now in some form in primitive and uncivilized communities. The next stage is reached when it is perceived that this slaughter, even though confined to a certain area, is hurtful to the society which permits it. It is perceived to be a wasteful expenditure of human life, which has a value to the community, and must not be appropriated to a private feud.

Buying off the Feud.

In a state of society, to call it so, where the problem of over-population was unknown and would have probably been unintelligible, where no humanitarian sentiment nullified the principles of natural selection, where only the strong could live, where the father of many male children was happy in that he could speak with his enemies in the gate, and 'hand-fasting' and 'bundling' were but natural tests of capacity, as on our own Borders, the community could ill spare its warrior, its man who could fight, and there grew up the view that a compensation is to be permitted, i.e. a payment to buy off the feud. Indeed the word *faidus*, which is found on the continent, means indifferently the feud itself or the payment to buy it off. It was apparently at first quite optional with the injured party or his relatives to take or reject the payment, but the amount of the payment seems at a very early period to have been settled by the common judgement of the community. Then there grows up what one may call an *opinio necessitatis*, i.e. the opinion that compensation *ought* not to be denied or refused. There are, however, some offences which are so grave as to be irredeemable or, as it is called, *bootless*. For them no payment is permitted. For instance, if a man kills another in his sleep or in church, he is expelled by his community and is driven forth an outcast.

The 'bootless' offence.

The stage at which compensation became customary cannot have been very much anterior to the compilation of customs known as the Leges Barbarorum, for the Lex Salica, the Lex Ribuaria and the Dooms of Ethelbert are full of minute regulations on the subject.

The King and Criminal Justice.

At this point we mark the intervention of the King, who takes advantage of public opinion to compel the payment of the compensation. He also compels the acceptance of it, and he takes $33\frac{1}{3}$ per cent. of the compensation for his trouble. In Anglo-Saxon language the general word for compensation is *bot*. The word for that part of the compensation which goes to the injured man or his relatives is *wer*, that part which goes to the king being called *wite*. On the Continent the word *faidus* stands for wer, while the word *fredus* is the equivalent of wite, and means a fine for the breach of the king's peace, *friede*. And it is interesting to notice that so strong has the king's position become, that in the peace of Hildebert and Clothar, we find that if a man compounds secretly for theft, he is a thief, for he has got the king's share. Very interesting is the action of the king with reference to the man who has committed a bootless offence. His expulsion by the community which he has outraged is prejudicial to the king's interests, for it deprives him of a warrior; therefore the king will overlook the offence on payment of a fine—to the king. The offender returns from the wilderness, and exemplifies the first operation of the new idea—Punishment, as opposed to Compensation. For offences, which the king or the State can remit, naturally come to be considered offences against the king or against the State. And this, it is happily suggested by Mr. Jenks, is the historical origin of the distinction which we nowadays observe between Tort and Crime.

Tort and Crime.

We possess the list, or rather the lists, of the Anglo-Saxon compositions (*wergild*). These compositions varied in various places; but in Anglia the king's life was valued at

30,000 thrimsas, the prince's 15,000, of a bishop or alderman 8,000, of a sheriff 4,000, a thane or cleric 2,000, a churl 266[1].

Adjective Law: its priority.

The first problem that meets a political society, so imperfectly co-ordinated that 'force is no remedy,' is how to persuade the plaintiff, whom it cannot compel, to come into court and deny himself the pleasure of private revenge. The next task is to consider the means of forcing the defendant to come in. The plaintiff was bribed in various ways. In the Roman law we know that the *furtum manifestum* is punished with twice as much severity as the *furtum nec manifestum*, and the explanation which is offered is that the injured man would be more likely to stay his hand when he caught the thief in fresh pursuit, if he knew that the law would, in punishing the culprit, consider not only the nature of the offence, which was indeed the same in both cases, but also the legitimate indignation of the law-abiding citizen. Our own Henry I decreed that all thieves taken in the act should be hanged[2]. It may, however, be that the skilful thief was considered rather admirable, and that the bungler got no sympathy. *Spondes peritiam artis.*

It is probable that trial by battle was another way of inducing the plaintiff to come in. It is happily suggested by Professor Maitland that the Burgundian rulers, in order to stop the execution of private vengeance, offered the plaintiff the physical joy of battle together with the intellectual pleasure of legal procedure. It is certain that in early stages of legal development, the plaintiff after he has once got the judgement of the court, is permitted to go and execute the judgement by himself, the explanation most likely being that the executive was too feeble to execute its judgements itself[3].

[1] Stubbs, *Sel. Ch.*, p. 65. [2] Ibid., p. 97.

[3] Cf. an extraordinary custom in the north country mentioned in Pollock and Maitland, *H. of E. L.*, vol. ii. p. 495, n.: 'Northumberland Assize Rolls, p. 70. Consuetudo comitatus talis est, quod quamcito aliquis

The prohibition occurring in the Dooms of Ine of Wessex, A.D. 680, against taking the law into one's own hands *without going first* of all to the proper court to seek justice, shows that at that time the reign of law is only beginning. But it was as difficult to bring the defendant into court as it was to persuade the plaintiff to forgo his right of private vengeance. The early codes which are known to us, as has been pointed out by Sir Henry Maine, deal largely with the important topic of summons, e. g. how the defendant is to be brought into court. If he is too ill to move, what steps may the plaintiff take to bring him[1]? What must be done if the defendant declines to come? Particular instructions are given in case of default of appearance. The remedy of distraint and outlawry are employed, and down to a recent period the English law recognized the persuasive treatment of the *peine forte et dure* to compel consent to the jurisdiction.

Of the actual administration of justice in the Anglo-Saxon period we do not know much. But it seems certain that justice was administered in the hundred courts every four weeks, and in the county courts twice a year[2], but apparently there was no efficacious method of compelling attendance before the court. There were private jurisdictions, jurisdictions with 'sac' and 'soc,' which apparently means the right to hold a court and the right to the profits therefrom. But the subject is obscure and will be referred to hereafter. The procedure which obtained in these courts was extremely primitive. It is not safe to suppose that these courts did much more than declare the local customs, but as those customs varied in different parts of the land this function was of the greatest importance. There was no weighing of evidence, and there was no testing of probability. Questions Anglo-Saxon justice.

capiatur cum manuopere statim decolletur, et ipse qui sequitur pro catallis ab ipso depridatis, habebit catalla sua pro ipso decollando.'

[1] Cf. the XII Tables.

[2] Stubbs, *Sel. Ch.*, pp. 70, 105.

of fact were decided by the oath. If a man was accused of a crime, and in proper form took an oath that he was not guilty, he was said to 'make his law.' The oath was conclusive, and the defendant cleared himself.

This advantage was however subject to certain conditions, for if the defendant was not oath-worthy, or if he could not get a sufficient number of persons to swear that the oath which he had taken was 'clean,' he was refused the oath, and he went to the ordeal. Besides this, if the guilt of the defendant was presumably clear, the privilege of proof was given to the plaintiff. He took the oath and excluded the defendant. The conviction that it is humanly impossible to prove 'intent,' a fact on which juries of the present day are invited to draw inferences from surrounding circumstances, produced minute rules as to external conduct. Even as late as the seventh year of Edward IV, the Chief Justice Brian said, 'The thought of man is not triable, for the Devil himself knoweth not the thought of man.' *A* kills *B*. The question arises—Was it intentional or was it an accident? The Anglo-Saxon court asked, How was *A* carrying his spear? Was he carrying it horizontally on his shoulder or with the point three fingers above the butt? Was he carrying it with the point back or in front? The intent of *A* is not considered, the rule being that a man shall carry his spear in a certain way, and if *A* has abandoned the rule, he has abandoned it at his risk. Again, it is very hard in such times to get evidence sufficient to convict people. This, it has been pointed out, explains the severity of the Anglo-Saxon law against those who have been often accused, and were of no credit. Such a man, if accused of any crime, is already half-condemned: there is no rule that he must be presumed innocent till he is found guilty [1].

[1] The late Mr. Justice Stephen expressed his inability to understand why a man should be presumed to be innocent when a Grand Jury had sworn that they thought him guilty.

The chief subjects dealt with in Anglo-Saxon courts of justice are offences of violence and theft, the theft usually being of cattle. Notions of contract are very rudimentary.

Absence of any 'common law.'

It must not, however, be supposed that all over England the laws or customs were identical. It is true that our law was Teutonic, but it flowed in from different sources. There was a large element introduced by the English conquest; there was a second element which was brought from Scandinavia by the Danish invaders. The Normans contributed another portion, consisting of Frankish ideas and customs, which were a variation merely of Germanic law. About a third of England was known as the Dane-law. There was an extensive Danish population lying to the north-east of Watling Street, that held the five boroughs of Stamford, Leicester, Derby, Nottingham, and Lincoln, places of great size and wealth, besides the important towns of Chester and York, and these Danish Norse people had their own customs. There was no 'common law' of the land. They lived under those customs which they had brought with them from their own country. We find this difference recognized in the various royal enactments. Thus, 'if a mass priest misdirects the people about a festival or about a fast, let him pay 30s. among the English, and among the Danes 3½ marks.' So also the laws of William the Conqueror give the different penalties for breaches of the king's peace by Mercian law, by Dane law, and Wessex law. And in the laws of Henry I we find the law of England divided into three—Wessex law, Mercian law, Dane law. And it is said that 'in many things they differ, but in many things they agree.'

Royal justice not ordinary.

At this period there is not only no common law of the land, but the king's justice is hard to get. Plaintiffs must not come and trouble the king's court unless they have suffered from failure of justice in the local courts[1]. And the

[1] Cf. Stubbs, *Sel. Ch.*, pp. 71, 73.

king's justice, when it is obtained, is merely the justice of the *Witan*, or great assembly of the nation, doing for the whole nation what the inferior courts did for their districts, viz. declaring the customs, and, as well as may be, finding the facts.

The King's military necessities.

It may be well to return to an observation made a little time back, and mention certain matters in which the military character of kingship had important results. The king's business being to lead successfully the host into battle, he naturally required the best men he could get to be his lieutenants. The inevitable result was that the old precedence of birth gave way to the claims of capacity or office. William himself was known as William the Bastard, and in English history several eminent soldiers—of 'composition and fierce quality [1]'—have been distinguished by the same name. It was the time when the change is made from Caste to Contract, when men are not so much born great as achieve greatness.

We have noted the theory that the differentiation of Crime from Tort is in a measure due to the military exigencies of the king; and it may be that in the fact that 'beneficia' were granted on terms of military attendance, and that the tenant who did not answer his lord's ban, and the 'gesithcund' man [2] who neglected the 'fyrd,' both forfeited their land, we find an explanation why the 'precarium' of the Continent is the 'fee' in England.

[1] *King Lear*, Act I. sc. ii.

[2] Stubbs, *Sel. Ch.*, p. 62.

CHAPTER II

THE NORMAN CONQUEST

ENGLISH AND CONTINENTAL FEUDALISM

Legal development on the Continent and in England.

THERE seems no evidence to warrant us in saying that with the Norman Conquest there was any 'reception' of Frankish law. The parent stock of the Anglo-Saxon and the Frankish customs was the same, but, owing to the different conditions which obtained in England and on the Continent, the development was different. England, till the fall of the great Wessex house, enjoyed peaceful progress, while the continent had been distracted by the anarchy which prevailed after the death of Charles the Great. It has been suggested that disturbed conditions, favourable to militarism and royal rule, gave birth on the Continent to the idea of punishment at a period when in this country our forefathers had progressed no further than the stage of bot, wer, and wite. Again, the weakness of Charlemagne's successors produced the system of private jurisdictions, and the disintegrating of the administration of justice, which lasted till the French Revolution. On the other hand, it has been suggested by Professor Maitland, that the adoption of the words 'sac' and 'soc' by the Normans when they came over here, indicates that the feudalization of justice had progressed further in England than in Normandy, and that they used these words because they had no words of their own which represented the ideas.

Private jurisdictions.

On such a topic it is rash to express any certain opinion in face of so great an authority. But it has been remarked that, although we find many grants of 'soc' in the Anglo-Saxon period—they are common enough—grants of 'sac' and 'soc' are not known before the time of Edward the Confessor. Now the difference is material. For 'soc,' it is submitted, means the profits of jurisdiction, those profits which would otherwise go to the king, while 'sac' means the jurisdiction itself[1]. The king might readily grant the profits of the jurisdiction to a favourite vassal, while objecting to part with the administration of justice, which in early society is one of the great prerogatives and obligations of royalty. But the Confessor granted both 'sac' and 'soc' with both hands to all sorts of religious foundations, apparently without the consent of the Witan. We find his grants to the Archbishop of Canterbury, the Archbishop of York, the Abbot of Malmesbury, the Abbey of Westminster, St. Paul's Minster in London, St. Mary's in Abingdon, and St. Edmundsbury. He 'granted entire hundreds outright into the hands of the church.' The Confessor was, apparently, the first English king to whom such jurisdiction appeared as a portion of his own private property. The view was novel and unconstitutional, and it does not seem to have survived the advent of the Normans, although, probably, it was from his acquaintance with Frankish customs that the Confessor had imbibed these high notions of his property in justice and jurisdiction[2].

'Sac' and 'soc.'

Suggested origin of the Manor Court

The jurisdiction of the manor court is explained by Mr. Adams in a very interesting way. That the manor courts

[1] This is the view most strongly maintained by Mr. Henry Adams in the essay contributed by him to *Essays on Anglo-Saxon Law*, Boston, 1876, pp. 40–44. 'Saca' and 'sôcn,' he says, are the equivalent of 'placita et forisfacturae.' It should, however, be stated that the general opinion seems to be that 'soc' means jurisdiction, and that 'sac' means profits; and that Professor Maitland in *Domesday Book and Beyond*, p. 84, inclines to the view that they are practically synonymous.

[2] *Essays on A.-S. Law*, pp. 51, 59.

had some sort of jurisdiction at the time of the Conquest seems to be generally admitted. We can, however, find no trace of jurisdiction having been expressly granted to the lord sitting in his court of the manor. But that rights of 'soc' were occasionally given to the lord seems certain from expressions which occur in the Anglo-Saxon documents. In the laws of Knut ii. 73, § 1, we find: 'Let him forfeit his wer to the king or to him to whom the king may have granted it.' Codex G provides a variant reading of 'his sôcne' for the word 'it.' So again, the Codex reads on Knut ii. 63: 'If any one take by force another's property, let him return it and its value, and forfeit his wer to the king or to whoever has his socn.' Again, on Knut ii. 37: 'Let him forfeit his halsfang (10*s.*) to the king or to the manorial lord, who has his soc.'

The popular courts were really courts for the declaration of local customs or assemblies of neighbours for mutual arbitration. It was apparently the almost invariable practice to accept a compromise, which was suggested by the friends of the parties. Arbitration indeed as we all know, is, even now, frequently preferred to law courts' justice with its delays and its uncertainties; and it possibly only required the consent of the parties to invest the manorial court with the powers of the hundred court, and if both parties were tenants of the same lord, it would be quite natural for them to agree to try the case before him. He probably had a grant of 'soc.' He no doubt would observe the usual forms, and it would be a convenience to the litigants. Moreover, the recognition of the private jurisdiction of the churches would assist the recognition of private jurisdiction generally. Thus by royal grant, or by prescription, grew up a new kind of local court. The result was that after the Confessor's reign, as Mr. Adams puts it, 'the entire judicial system of England was torn to pieces,' 'justice was no longer a public trust but a private property.' The manor court was always considered

based on consent of parties.

a private or proprietary hundred court. It administered the law of the hundred, it observed the procedure of the hundred, and, like the hundred court, it was controlled by the shire court.

Statutes of William the Conqueror.

It is wrong to suppose that, after the Conquest, a foreign system of law was violently imposed on the inhabitants of the conquered country, or, indeed, that William was a great law maker. He was not, nor did he profess to be. He expressly declared that all men were to enjoy the law of King Edward, which they enjoyed before he invaded the country. We have, indeed, in the Bishop of Oxford's *Select Charters* [1], those Statutes of William the Conqueror in a MS. attributed to the time of Henry I, which probably contained all his legal enactments; and an examination of these will show us that they were, if we use the expression a little loosely, rather measures of police and administration than the making of new law. He says that Normans and English are to be within his peace: that every one is to swear fealty to him: that Frenchmen who have come with him from Normandy are to be specially protected, and, if they are killed, there is to be a fine on the hundred in which they are found [2]. Every freeman is to have pledges bound to produce him if necessary: every one is to enjoy the laws of King Edward, even those Frenchmen who lived in England in the time of King Edward. If a Frenchman appeals an Englishman of certain grave offences, the Englishman may defend himself by the ordeal of iron or by battle, and if he is feeble he can find a champion. If an Englishman appeals a Frenchman, and does not wish to prove his case by ordeal or battle, the Frenchman can purge himself by unbroken oath. Capital punishment is abolished. No one is to be

[1] Stubbs, *Sel. Ch.*, pp. 83–85.

[2] By the time of Henry I every dead man is presumed to be French, unless his Englishry is proved. A very neat doctrine for Revenue purposes, as the records show, for if a stranger is found dead, who can prove that he is English?

sold out of the country, and the sales of live beasts must be attended by certain formalities. One important change was introduced by William in separating the lay and the spiritual jurisdictions[1] He forbade bishops and archdeacons holding the pleas of ecclesiastical discipline in the hundred courts; such pleas must be judged not according to the hundred, but according to the canons and the episcopal laws. He also forbade any sheriff, or royal minister, or any layman, to meddle with ecclesiastical matters. No canon was to be enacted, and none of his barons were to be excommunicated without his leave[2].

The New Feudalism.

The Norman Conquest is an important stage in our history because it was the moment for receiving a new political idea, and the moment for introducing new methods of administration. The new political idea was feudalism, and it was feudalism with the fangs drawn. William, it cannot be doubted, was a man of high political capacity. He was king in England, while in Normandy he was a great feudatory. He knew the feudal system, and, if we may say so, he knew it backwards.

The Continental Fief.

The fief, historically regarded, was a fragment of the empire of Charles the Great, which, in the time of his feeble successors, broke off and set up for itself. It was in its essence a military group, the lord having the right to summon by his 'ban' his immediate vassals to war. But, according to the notion prevalent on the continent, although he was entitled to summon his immediate vassals, he could not summon the vassals of his vassal. To use the language of the period, although he had the 'ban,' he had not the 'arrière ban.' Thus the Carlovingian sovereigns were only able to summon their great vassals, the lords of the great fiefs, which had been granted on condition of military service. At the same time the lord, although a military leader, presided in his court, in which was administered the law of the fief. The power of these great feudatories was so formidable that it

[1] Stubbs, *Sel. Ch.*, p. 85. [2] Ibid., p. 82.

required a very strong man to deal satisfactorily with them. The successors of Charles the Great were unequal to the task, and the weakness of the system, in which the empire consisted of a great number of what were really smaller independent kingdoms, was exposed when the Huns swept down and attacked them in detail. It was under these peculiar circumstances that self-preservation made it necessary to elect a new head. Prince Hugh was elected king, and the State revived. The king next attempts to assert his peace, and assumes the task of maintaining and upholding law and order. This assumption was the almost inevitable result of the position which he occupied. *Plures sustinebat personas.* These great leaders were also great feudatories. They had great estates of their own, and on their own demesnes they discharged judicial as well as military functions; any disputes arising on the demesne must be settled, and judgement must be given, in the court of the fief, where his vassals are *pares curiae.* The lord, it is true, presides, but the judges are the body of his own tenants. He naturally endeavours to extend this theory to his new kingdom. The effort was a failure in Germany, and it made very little headway in France, but in England it was marked by entire success. The conditions were indeed favourable. England was an entire fief, obtained by conquest, and the advantages of its geographical position could hardly be surpassed.

The English Fief.

William, when he exacted the oath of fealty from all 'land-owning men of property' at Sarum [1], freed himself from the difficulty under which the Frankish sovereigns laboured. There was no doubt after that, that he had the *arrière ban*, and he could call upon all the freemen in this country, to whatever lord they belonged, to come and serve him on his summons. But that was not all. There is one thing that is very irksome to the individual, and that is liability to military service, which may be enforced at uncertain times at the

[1] Stubbs, *Sel. Ch.*, p. 82.

command of the king. There is one thing that the State is always ready to receive, and that is money. It is an arrangement agreeable to both parties that the State, in consideration of receiving cash, shall allow the subject to rid himself of a very unpleasant duty, and this was perceived as long ago as the time of Pericles. So when Ralph Flambard, the Justiciar, took the ten shillings[1], the 'viaticum' which the shires had provided, from the twenty thousand men who had come down to Hastings to serve the king abroad, and then excused them from further attendance, the time was foreshadowed when, under the name of 'scutage[2],' it became the ordinary rule to redeem personal service in the army by the payment of money. As every freeman was liable to serve the king in his wars, so every one was liable to pay a tax; and when not only the subject, but every resident in the country is made liable, we have the modern view of taxation.

William very early saw that he might be met with the same difficulties which had so much troubled his Frankish colleagues, for it was necessary to reward the successful soldiers, who had assisted to found his kingdom in England. He perceived, however, the danger which would attend the giving of great estates to these barons, who would almost inevitably have set up pretensions fatal to the consolidation of the royal power, and William had no mind to spend his time in reducing his own creatures to subjection. There were two exceptional grants which we know that William made, but both on the Marches, we may notice, where rough work had sometimes to be done. He granted to Hugh Lupus the county of Chester, 'hunc totum comitatum tenendum sibi et heredibus ita libere ad gladium sicut ipse rex tenebat Angliam ad coronam,' i. e. a full grant of *jura regalia*. Soon after he made a like grant to the Bishop of Durham. With these exceptions, he gave them indeed great estates, but these great

[1] Stubbs, *Sel. Ch.*, p. 153. [2] Ibid., p. 129.

estates did not lie all together, but were scattered in different parts of the country.

The Frankish kings had been much hampered by the fact that, in order to diffuse the king's law, they had conferred on their great feudatories portions of the royal jurisdiction, and that these great feudatories had taken advantage of the weakness of the central government to make that jurisdiction, which was originally royal, private and personal. William avoided this difficulty by creating no new jurisdictions, but using the existing machinery. The hundred court, the manor court, and the shire court, remained the only ordinary courts in his reign, and the king took notice that none should have more 'sac' and 'soc' than had been enjoyed in the time of his predecessors.

But it is interesting to notice that, although the sagacity of William relieved him from trouble on the score of the military summons, a precisely analogous difficulty was raised by the barons under his successors with regard to the judicial summons. The vassal's vassal must, they said, answer in the court of his lord, and not in that of his over-lord[1].

The eventual failure of this claim is an incident in the victorious advance of the Royal Justice.

[1] Mag. Ch., § 34. Stubbs, *Sel. Ch.*, 301.

CHAPTER III

THE KING AND PROCEDURE: THE INQUEST

THOUGH the courts remained unaltered, a great step was taken in the improvement of the administration of justice and procedure. The Anglo-Saxon forms of proof were ordeal, compurgation, witnesses, and charters: judicial combat cannot be discerned before the Conquest. Professor Maitland considers that combat existed, but was extra-judicial—an opinion which Mr. Bigelow seems to share, and doubtless we are safe in considering combat as 'regularized' blood-feud procedure. The Normans, however, were quite familiar with the duel as a judicial method of proof, and introduced it into England, although, as we have seen, William did not force this procedure on his new English subjects. Ordeal was frequently used in criminal cases down to 1184[1]. But in Henry II's time there is no record of it being used in civil cases, and it did not in any form survive the condemnation of the Lateran Council in 1215. Witnesses were used in Anglo-Saxon times for party proof, and must be distinguished from compurgators. The compurgators swore to the credibility of the party, they did not swear to the facts; the witnesses spoke to facts *de visu et audito*, and employed a set formula. The witness appears and thus makes oath. 'In the name of Almighty God as I here for N. in true witness stand, unbidden and unbought, so I with my eyes oversaw, and with

Early Procedure.

Battle.

Ordeal.

Witnesses and compurgators.

[1] See Pl. Ang.-Nor., pp. 231, 233.

my ears overheard, that which I with him say.' The oath of the compurgator on the other hand was, 'By the Lord the oath is clean and unperjured which N. has sworn.'

The witness, although he testified to facts, only swore to the assertion of his chief, and unless produced by the party, could not give evidence, however much he knew of the case, and when produced was confined to the formula prescribed by the interlocutory judgement by which the burden of proof and the subject of proof were declared. For in the Germanic courts judgement came first and evidence after[1]. Charters were always used if they existed, and excluded all other evidence except that of witnesses[2], though if they were in a dilapidated condition, they might be assisted by other evidence. Thus, in the case of *Bishop Wulstan* v. *Archbishop Thomas*[3], in 1270 the proof was made 'justo Dei judicio ac scriptis evidentissimis detritis, et penitus annihilatis.' Compurgation was permitted up to 1166, the date of the Assize of Clarendon, to disprove accusations of crime[4]. After that date, if an accusation was presented by inquest, the accused man had to clear himself by ordeal. All these methods, however, were fated to disappear before an institution which was introduced by the Norman king. That institution was the 'inquest.'

Charters.

Recognition by Inquest.

The Inquest was a royal and privileged procedure unknown to, and not exercised by, the courts of the clan or the fief. It was employed by Charlemagne and his successors to discover the property of the fiscus. They sent Commissioners, 'Missi,' to inquire on the spot, and the neighbours were summoned and compelled to swear, whether they liked it or not, whether or no there was any Treasury property in their part of the world.

[1] Cp. the formulary procedure at Rome.
[2] *Abbot Athellelm* v. *Officers of the King*, Pl. Ang.-Nor., p 30.
[3] Pl. Ang.-Nor., p. 2.
[4] Vide the curious case of Matilda, Pl. Ang.-Nor., p. 79.

The Inquest, due seemingly to the invention stimulated by the royal fiscal necessities, was soon perceived to be an admirable weapon for the discovery of truth and fact of all sorts. Local knowledge was made available to inform the royal mind at a time when the Government was unorganized and communication difficult. And it is worth noticing that, when the Conqueror set about compiling that great revenue book, which we know as Domesday, his business capacity selected the Inquest as the true method for ascertaining what it was essential for him to know [1].

So useful a procedure was not likely to be long confined to one sort of inquiry.

The Frankish kings used the Inquest in their law-suits in preference to other methods of trial. They preferred the verdict of the neighbourhood to battle or ordeal. A procedure which they found so trustworthy themselves, they were ready to grant as a favour to others, and, it is hardly necessary to say, granted it in return for payment.

Battle in England was unpopular; the ordeal was, for reasons good or bad, not trusted; and the procedure by oath-helpers gradually came to be regarded as unsuitable to the serious administration of justice.

In England we find the king employing procedure of the Inquest in his own business. It is used for the ascertaining of royal rights, and for the discovery of royal property. The king can direct it to be used on any occasion he chooses, and he allows it to favoured churches [2]. It immediately comes into use in litigation, although the occasions when it is employed are at first exceptional.

As it is good to see the actual words of a document, a writ ordering an Inquest is appended, which, with many others of the greatest interest, have been collected and printed by

[1] Stubbs, *Sel. Ch.*, p. 86.

[2] e.g. to the Abbot of St. Augustine, Pl. Ang.-Nor., pp. 33, 66, Bishop Robert, p. 139, The Church at Ely, p. 24; and cf. P. and M. i. 122.

Mr. Bigelow. The Abbot of St. Augustine had complained that his ship had been taken from him.

> 'Willelmus filius regis Willelmo vicecomiti de Kent salutem. Praecipio quod praecipias Hamoni, filio Vitalis et probis vicinis de Sandwich, quos Hamo nominavit ut dicant veritatem de nave abbatis de Sancto Augustino, et si navis illa perrexit per mare die qua rex novissime mare transivit, tunc praecipio ut modo pergat quousque rex in Angliam veniat et interim resaisiatur inde abbas praedictus. Teste episcopo Sarum et cancellario apud Wodstoke.'

The 'vicini' having found in favour of the Abbot, a writ comes down from Windsor ordering the sheriff to put the Abbot back in seisin of his ship, 'sicut recognitum fuit per probos homines comitatus.'

In the case of *Archbishop Lanfranc* v. *Bishop Odo*[1], in 1071, there was an action and a writ for the restitution of lands. The plaintiff recovers many manors and franchises, and elucidates many 'consuetudines.' The case was heard in the county court. The Bishop of Coutances presides, and there is a mixed jury of French and English 'in antiquis legibus et consuetudinibus peritos,' who apparently are not sworn.

From the records it appears that the inquisition was the finding of facts by impartial men, generally, but not always[2], on oath, examined by an officer of the law acting under the king's writ. The number of these men varied, it is sometimes sixteen[3], but in Glanvill's time they were generally twelve. They were required to be unanimous, and if they could not agree after being afforced, the inquisition apparently failed. In the case of *Bishop Wulfstan* v. *Abbot Walter*, in 1077[4],

[1] Pl. Ang.-Nor., p. 4.

[2] See the case of *Bishop Robert* v. *Lord of Stow*, Pl. Ang.-Nor., p. 139. The royal writ orders an inquest 'per probos homines' as to boundaries, 'et si bene eis non credideritis sacramento confirment quod dixerint.' Also perhaps *Bishop Gundulf* v. *Pichot*, Pl. Ang.-Nor., p. 34.

[3] *Monks of St. Stephen* v. *The King's Tenants*, Pl. Ang.-Nor., p. 120.

[4] Pl. Ang.-Nor., p. 16.

the plaintiff claims certain services from the defendant. The Bishop of Coutances again presides under the king's writ over an assembly 'vicinorum comitatum et baronum.' The plaintiff produces, after making his claim, 'legitimos testes' who had seen and performed the services in the time of Edward the Confessor. The Abbot, having no witnesses, is permitted to produce the relics of St. Egwin, but by the advice of his friends consents to judgement.

So again in the case of *Ivo Tailboys* v. *The King*. 'In Limberge clamat Ivo Tallebosc super regem sex bovatas terre. Dicunt homines comitatus quod ipse debet habere terram et rex socam [1].'

[1] Pl. Ang.-Nor., p. 58.

CHAPTER IV

THE NORMAN COURTS OF JUSTICE. ROYAL AND LOCAL

AFTER the Norman Conquest we find the following courts, leaving out of account the ecclesiastical Courts: the Great Council or the Witenagemot, the King's Court, the Exchequer, the County Court, the Burghmote, the Hundred Court, the Manorial Court, the Forest Court. Some confusion arises in the sources from the fact that the term Curia Regis is used of the Great Council, the King's Court, and apparently of the County Court on certain occasions.

The Curia Regis.

The expression Curia Regis can mean, when used in its narrowest sense, those great assemblies of the nation, on the three great feasts of the Church—Easter, Pentecost, and Christmas—'when the king wore his crown [1].' It was also applied to an assembly of all the king's great men 'congregatis in aula regali primoribus regni' (*The King* v. *Earl Odo*, Pl. Ang.-Nor., p. 291 [2]). It was also applied to a meeting

[1] Stubbs, *Sel. Ch.*, p. 81.

[2] This was the remarkable case in which William accused his half-brother Odo, Bishop of Bayeux and Earl of Kent, whom he had left as Justiciar of England during his own absence on the Continent, of treason and abuse of office. The king, addressing the assembly, concludes thus: 'Et frater meus cui totius regni tutelam commendavi violenter opes diripuit, crudeliter pauperes oppressit, frivola spe milites mihi surripuit, totumque regnum injustis exactionibus concutiens exagitavit: Quid inde agendum sit caute considerate.' The assembly, however, was a little shy of offering an opinion against so great a person: and noticing this the

for business of the king's household or personal attendants, and to the county court, when either the itinerant justice went down to it or sometimes when the sheriff presided, in the king's name, on the king's business[1].

The King's Court, in the sense in which the expression is most usually employed, was a smaller body of great men who usually surrounded the king, and who belonged, of course, to the Great Council. It represented the king, and if the king was not there in person he was there in theory[2].

The Exchequer which, under the first two Norman kings, is called 'the Treasury' or 'Thesaurus' was a fiscal department, and in it were settled the claims of or against the king's treasurer or his foresters. The source of our information on this point is the Dialogus de Scaccario[3]. From it we find that till Henry I payments were made to the Treasury not in gold or silver, but in kind: 'non auri vel argenti pondera sed sola victualia solvebantur,' which supplied the necessary wants of the king's house. These provisions were paid in at a certain rate, e. g. for an ox, 1*s*. 'pro ariete vel ove iiii. d.' But for the king's foreign wars money was essential, complaints of exactions were unceasing, and when the king was travelling the inhabitants used to meet him, offering their ploughshares, 'in signum deficientis agriculturae[4].' Henry accordingly fixed a money payment of an equivalent value, which was to be paid by the estates liable, and the sheriff of the county was to account 'ad Scaccarium.' The

The Exchequer.

'magnanimus rex ait, Hunc virum, qui terram turbat comprehendite,' and when no one dared to move, the king himself arrested him, 'rex ipse primus apprehendit eum.' And when the bishop cried out 'clericus sum, et minister Domini,' and that as a bishop he could not be condemned without a judgement of the pope, the king, 'providus rex,' shrewdly answered that he was condemning not the prelate, but his own earl, whom he had placed over his kingdom: and sent him to prison where he stayed as long as William lived.

[1] See P. and M., vol. i. p. 132; and Bigelow, *History of Procedure*, pp. 21 sq.

[2] Case of the Abbot of Leicester, Abb. Plac. 2 John 32.

[3] See Stubbs, *Sel. Ch.*, pp 168 sqq.

[4] Ibid., pp. 193-4.

barons sat one side of the chequered table, the sheriff on the other, and thus was played the game of exchequer chess described in Mr. Hubert Hall's book [1]. The justiciar presided *virtute officii*, the chancellor, who kept the king's seal, being also present. The table was covered with a cloth 'which is of a black colour rowed with strekes distant about a foot or span.' On these spaces were placed the counters, with marks denoting their value. As no doubt the same great men sat in the Exchequer that sat in the King's Court, it gradually took hold of judicial work. In Henry I's time we find it taking common pleas.

In the case of *The men of Periton* v. *the Abbot Faritius* [2], about 1109, we see the action, which was for the recovery of a manor, being tried in the Exchequer before three bishops and many barons. The Queen's writ uses the words 'in curia domini mei et mea apud Wintoniam in *thesauro*.' It is suggested by Mr. Bigelow (*Hist. of Proced.*, p. 127) that the reason for trying a case of this sort in the Exchequer was that in it was kept *Domesday Book* or the *Liber de Thesauro*, which in this case was referred to on the question of title. In the case of the *Abbot of Westminster* v. *Certain Men* [3] in the same reign, the writ to the Bishop of London directs him to do right to the Abbot of Westminster for a trespass 'et nisi feceris barones mei *de Scaccario* faciant fieri ne audiam clamorem inde pro penuria recti.'

That it was a matter of favour or at any rate a privilege to get one's case tried before the Exchequer is probable from an entry that we find in the eighteenth year of Henry II, in which it is said that Robert the son of Ernisus owes five marks for having his plea, which is between him and Hugo Malebisse before the Justice ad Scaccarium [4]. It may

[1] *Antiquities of the Exchequer*, 1891.

[2] Pl. Ang.-Nor., p. 99. [3] Ibid., p. 127.

[4] Pl. Ang.-Nor., p. 271. So also case of Robert de Hasting, 14 Hen. II. Ibid., p. 269.

be that the advantage of getting an action heard in the Exchequer was that if plaintiff succeeded, he could avail himself of some summary procedure which was employed in collecting the king's debts. It is suggested with some plausibility that as there was no distinct court of common pleas, the provision in Magna Charta that the common pleas should no longer follow the king was aimed at depriving the Exchequer of the litigious work which they had usurped. It did not, however, entirely succeed, for Edward I, in the Statute of Ruddlan, 10 Edward I, prohibited the Exchequer from entertaining common pleas on the ground that this prevents them attending to their proper business, which was the care of the king's revenue. 'But for so much as certain pleas were heretofore holden in the Exchequer whereby as well our Pleas as the causes of our People are unduly prorogued and letted, we will and ordain that no plea shall be holden or pleaded in the Exchequer aforesaid unless it do specially concern us and our ministers aforesaid.'

The Shire or County Court.

The County Court, which was of Anglo-Saxon origin, continued to exist under the Norman kings. It was the only court of general jurisdiction in the country. The Conqueror, although he had separated the lay and spiritual jurisdictions, did not forbid ecclesiastics to sit in the county court. Indeed, in the 'leges Henrici primi' we find that in the county courts 'intersint episcopi comites barones, &c. Agantur . . . . secundo regis placita, postremo causae singulorum[1].' In the county courts, as we have seen, important trials take place. They are attended by the sheriffs as presiding officers, by 'bishops, earls, vicars, hundredmen, ealdormen, bailiffs, barons, vavasours, reeves and other lords of lands': the priest, the reeve, and four of the best men of the 'villa' were to come to represent all who were not specially summoned if the local baron and his steward were necessarily absent. The only

[1] Stubbs, *Sel. Ch.*, p. 105. Leges Hen. I. 7, §§ 2, 3, 7. See Bigelow, *Hist. of P.*, p. 133.

way by which a freeman could avoid attending was by compounding with the king [1]. They met twice a year at first, but later once a month, and they entertained causes where it was alleged there had been a failure of justice in the hundred or the manorial court, either on the complaint of the party or by a writ from the king addressed to the sheriff. It appears that the county court had an original jurisdiction where the vassals of two lords were litigating [2], and over those pleas of the crown where the jurisdiction did not belong in the first instance to the manorial court. If the case was of great importance sometimes five or even more shires were summoned: see the case of *Bishop Odo* v. *Walter of Evesham* [3].

The Burghmote.

The Burghmote was a county court established in a city which had municipal privileges of its own.

The Hundred Court.

The Hundred Court or Wapentake Court met every month. The landowners who had no jurisdiction of their own, the parish priest, the reeve and the four best men of each town in the hundred were summoned to it, perhaps all freemen [4]. It was presided over by the ealdorman or by the bailiff of the hundred. It entertained such questions as were not dealt with by the manorial court, and cases in which tenants of lords who had no jurisdiction were concerned. Its proper business was apparently 'causae singulorum,' though according to the rolls of the Curia Regis (1 Rot. Cur. Reg. 205, 207) appeals 'de pace regis infracta,' probably of a minor impor-

[1] In 1259, by the further Provisions of Oxford, the bishops and barons were excused attendance at the county court. But so imperceptible had been the change from local to royal justice that the great men of the county thought they had a right to sit on the bench at the Assizes. This was forbidden by 20 Ric. II, c. 3.

[2] Stubbs, *Sel. Ch.*, p. 104.

[3] Pl. Ang.-Nor., p. 20.

[4] The writ relied on by Mr. Bigelow (*Hist. of P.*, p. 142) to prove this, in *Bishop Robert* v. *Men of W.*, Pl. Ang.-Nor., p. 139, summons all barons, vavasours, and all lords, to the wapentake of the Bishop of Lincoln, 'which he holds of me' . . . 'ne perdam pecuniam meam.' Might this not be an exceptional case, the king's revenue being concerned, justifying an exceptional summons?

tance, came before it. In the 'Leges Hen. I.' 8 § 1[1] it is directed that all freemen shall twice a year meet in their hundred, to ascertain inter cetera if the 'decaniae' (the tenmantale) are full; in other words, to hold a 'view of frankpledge.' This meeting was later known as the 'Sheriff's Tourn.'

The Court of the Manor.

The Manorial Courts were courts of the same rank as the hundred courts, but the extent of their jurisdiction varied, and depended on the royal charter which conferred the jurisdiction; or, in the absence of a charter, on the long-established practice of the court. In this court was transacted the business of the manor, including matters touching the obligations arising from tenure, and there was frequently a criminal jurisdiction. In some cases these baronial franchises were so extensive as to found a claim for excluding even the king's justiciar. So we find in the rolls of the King's Bench in the time of Richard I, in a case where Agnes de Bascoville demands the castle of Bredewardine, in her right and inheritance of which Robert de Wastre deprives her, the Sheriff of Hereford is ordered to take the castle into his hands. He says it is out of his bailiwick, and he dare not meddle, and 'William de Braosa says that neither king, justice, nor sheriff, ought to lay their hands on his franchise. The case is adjourned *sine die* till the pleasure of our lord the king is known hereon[2].'

The Writ of *Quo Warranto*.

It was not till the reign of Edward I that the jurisdiction which remained in the manorial courts was seriously questioned. By means of the statute of *Quo Warranto* the Crown called on every one to show title for liberties that they claimed; and the Crown lawyers distinguished between *libertates* and *regalia*. These latter, such as view of frankpledge, could only be held by royal grant; the others, such as jurisdiction over

[1] Stubbs, *Sel. Ch.*, p. 105.

[2] Dĩc. q̃d. n^c rex n^c justič. n^o vĩc debñt mañ suã appoñe in lib.tate sua. Loq̃la remanet sñ die. don^c sciat^r iñ voluntas dñi Reg̃ (Palg., *Rot. Cur. Reg.*, i. 426).

manorial offences, e.g. ploughing badly, flowed from tenure. In 1290 Edward compromised, and agreed that continuous exercise from before the coronation of Richard I should be a good answer. But further encroachments were stopped. The writ was as follows:

> 'Rex vicecomiti salutem. Summone per bonos summonitores talem quod sit coram nobis apud talem locum in proximo adventu nostro in comitatu praedicto vel coram iustitiariis nostris ad proximam assisam cum in partes illas venerint ostensurus quo warranto tenet visum franciplegii in manerio suo de N. et habeas ibi hoc breve.'

At the present day the procedure is by motion for an order *nisi*, calling on the defendant to show cause why an information should not be exhibited against him to show by what authority he exercises the particular office or franchise.

The Forest Court.

There remains the Court of the Forests. The forest courts were royal courts held by the foresters of the king, or by the sheriff of the county where the king's forest lay. They exercised a summary jurisdiction in cases where any violation had occurred of the king's rights in the forests. The jurisdiction was mainly *ex delicto,* though perhaps they took cognizance of leases and clearings. The forest administration was extremely unpopular, probably from the reason that it was summary, and very little redress was likely to be got. We may notice the case of *Abbott Walter* v. *Alan de Neville* 'qui praeerat domini Regis forestariis.' Alan was a bad man, vexing all England 'innumeris et insolitis quaestionibus. Nec deum nec homines verebatur,' and among other iniquities had forcibly collected moneys on the lands of Battel Abbey for clearings ('vi exegit'). The money had been paid into the exchequer, but was recovered by the Abbot who produced charters to the court. Alan does not seem to have been disturbed, and the office remained in his family. The monkish chronicler says that, on the death of this good and zealous servant, when a certain monastery sought a portion

of his goods, the king said 'I shall have his wealth, but you may have his carcass, and the devil may have his soul[1].'

The royal justice was still mostly extraordinary, and by that is meant that the king's court was not to be approached except by way of appeal and in the last resort. This had been so in Anglo-Saxon times, for we find in the ordinances of Edgar 'let no one apply to the king in any suit unless he at home may not be worthy of law or cannot obtain law: if the law be too heavy let him seek a mitigation of it from the king[2].' So again in the Secular dooms of Canute, we find 'and let no one apply to the king unless he may not be entitled to any justice within his hundred[3].' Or in the Latin form in which it appears in the laws of the Conqueror, chap. xliii. 'Nemo querelam ad regem deferat nisi ei ius defecerit in hundredo vel in comitatu.'

Royal Justice still usually extra-ordinary,

Although the king's court was, for the ordinary people, a court of last resort, it must be remembered that certain people would go there originally. The great nobles, bishops, and archbishops would not submit to the jurisdiction of a court presided over by some one very much inferior in rank to themselves. It is suggested that the clause in Magna Charta concerning 'judicium parium' was really due to the dislike of the great barons to come into a court presided over by the royal judges, who were, apart from their official position, persons of no great account. And besides this, it should be borne in mind that it was good feudal doctrine that no one was bound to answer in any court but the court of his own lord. These great nobles were all tenants of the king; the king's court, therefore, was the court to which they would naturally resort. The king's court may be said truly to be 'the court of great men and of great causes.'

but sometimes ordinary.

[1] Bigelow, *Hist. of P.*, p. 146, n.

[2] Stubbs, *Sel. Ch.*, p. 71.

[3] Ibid., p. 73.

CHAPTER V

THE DECLINE OF THE LOCAL COURTS. THE ROYAL WRIT PROCESS

Rise of a 'common law.'

For those who study the development of the laws of this country it is well to keep in mind one important fact, that the period which lies between William I and Edward I was the time during which the royal justice gradually dwarfed and finally superseded all other justice, with the result that there was produced a common law of the land. The time had come for Wessex, Mercian, and Dane law, to give place to the common law of England; and, with the exception of the customs of Kent, the one surviving custom is the custom of the king's court.

'Pleas of the Crown.'

The king's court had comparatively little original jurisdiction for some time after the Conquest. It was the court for great men and great causes, and it also took cognizance of what are called 'pleas of the Crown.'

The local courts can nominally entertain all pleas *exceptis excipiendis* as Mr. Maitland says, i.e. those which the king reserves.

The list of pleas of the Crown is uncertain and irregular. In the laws of Henry I, chap. x, *De Jure Regis*, we find, 'Haec sunt jura quae rex solus habet in terra sua, commoda pacis et securitatis institutione retenta infractio pacis regis, murdrum, utlagaria, incendium, robaria, injustum judicium, defectus justitiae,' but the list was not

constant. We know that thefts, scuffles, blows, and wounds, could be dealt with in the county court on appeal from the hundred or the manorial court[1]. Civil actions, except those arising between great men, were tried in the local courts.

The chief instrument for bringing about the supremacy of royal justice was the 'Writ.' The king's writ, it has been happily suggested by Mr. Jenks, is the descendant of the royal Ban. It was the king's order directed to his liege, written on parchment and sealed with the royal seal, and disobedience to the writ was a contempt of the royal authority, and entailed penal consequences. The writ, like the inquest, was originally used for royal purposes, and to protect the royal interest; but, like the inquest, so efficacious a weapon was purchasable by the subject, and the advantages of getting it were found to be so great that it has superseded all other processes, and remains in use to the present day. The writ, moreover, being a written document, was capable of being registered. The king's officer kept a register of the writs issued; and this register was available as a book of precedents, though it need not be supposed that writs in the earliest times were classified with any exactness. **The royal writ.**

The king, as we see in the Norman times, took a personal part in the administration of justice. He sat in court himself, and he issued his orders to his vassals and his subjects in the full expectation that they would be obeyed. It is very doubtful if we can consider the writ as being at first judicial. It is perhaps safer to regard it merely as a royal command. There was a large number of writs or mandates by which the sovereign directed the performance of any desired act by his subject. They issued irrespective of intervention by the courts, and have now become of course obsolete. But it seems that the term 'mandamus,' derived from these letters missive, was gradually confined to the writ issued from the King's Bench, **At first not judicial.**

[1] Glan., lib. I, c. 4.

which has developed into the present prerogative writ of mandamus.

From the precedents that we have before us we may infer that these commands were of all sorts, and it never seems to have occurred to anybody that the king's writ was insufficient on any ground, or that it could safely be disobeyed. The king is the fountain of justice, his word is law, and his writs settle the rights of men. He writes to the sheriff 'Volo et praecipio,' and the sheriff does what he is told. *A* is to hold certain lands; if any one turns him out the sheriff is to put him in again [1]. *B* is to be free of customs [2]. *C* is told to perform customary services of his land to *D*; if he does not, *D* is to be allowed 'suam voluntatem facere [3].' Strangers are not to go fishing in certain places on the Thames [4]. He orders fugitives,—whenever found,—from the Abbot of Abingdon to be restored [5]. Abbot Simeon is to have 'soc' and 'sac' as his ancestor had [6]. Bishop Remigius, on the other hand, is to be prohibited from having any new customs below the island of Ely [7], 'For I will not that he have any but those which his predecessor had in the time of King Edward.'

A curious case is that of *Modbert* v. *the Prior and Monks of Bath* (1121) [8]. The writ, or as it is called, 'literae cum sigillo regis,' comes down to the Bishop of Bath. The king is abroad, so his son sends the writ. 'Willelmus filius regis Johanni episcopo de Batha salutem. Praecipio ut saisias Modbertum juste de terra quam tenuit Grenta de Stoca, sicut haereditavit eum in vita sua.' The plaintiff said that he was the adopted heir of the late owner, and so was entitled to the land. The defendants said that the dead man was only a tenant for life under them, and surrendered before death. They produced witnesses, and also a charter. The bishop apparently observing

[1] Pl. Ang.-Nor., p. 108. [2] Ibid., p. 74. [3] Ibid., p. 97.
[4] Ibid., p. 90. [5] Ibid., p. 94. [6] Ibid., p. 26.
[7] Ibid., p. 27. [8] Ibid., p. 114.

the word 'juste' in the writ, says that he agrees, and will obey the writ 'si tamen justum est,' and proceeds to try the case to see if it is just. The parties contradict each other, a great discussion ensues, and the decision seems far off. The bishop says, 'the day is getting on, and we have other things to do,' and sends apart some who are older and more skilful in the law than others. They say the plaintiff must produce either a charter, or two witnesses against interest. He fails to do so, and the court then breaks up. There were present two bishops, three archdeacons, 'cum clericis pluribus et capellanis.' A report of the proceedings is sent to the king, and down comes a writ to the bishop commanding that the monks do hold their land in Stoke, 'in pace et juste et honorifice,' according to the judgement. This court was held, like many courts were, in a private house.

It is suggested that those writs which resemble in their nature writs of execution, which give us no hint of prior judicial proceedings, and by which the king seised and disseised persons at his will, gave rise to the clause in Magna Charta by which the king promises that he will not disseise or imprison his free subjects unless by the legal judgement of their peers or the law of the land. There certainly is a very remarkable case of *The Church of Abingdon* v. *William*[1], in which one William complained to Henry I that he had been put out of possession of a mill by the late Abbot Faritius, 'quare regis mandato saisitus est inde'; but afterwards the king, having been approached by the monks, and having 'learned the truth,' ordered the church to be put back in their seisin. In this case it seems quite clear that no judicial investigation had preceded the issue of the writ of the king.

With these data before us, is it unjustifiable to draw the inference that the king it was who, by his mere command, settled the rights of his subjects? It really looks as though these inquests were not an essential part of the process, but

[1] Pl. Ang.-Nor., p. 130.

that they were employed to inform the king's mind as to the true state of the facts. In the last case we have no mention of an inquest, but after one writ has been sent down, the monks send Walter *capellanus* to persuade the king that he was wrong, he does so, and a new writ appears. In *Modbert's* case, it seems as if there would have been no inquiry had it not been for the word 'juste' occurring, which the bishop interpreted as making the order conditional.

The royal justice becomes 'ordinary.'

The general jurisdiction of the various courts being as we have said, and the king having a residuary or appellant jurisdiction, and also a weapon like the writ ready to his hand, the royal authority commenced to encroach upon the inferior tribunals. In the time of William I eminent men had been sent down into the local courts to try important cases, and in later reigns the sheriffs who presided in the shire courts were not unfrequently royal justices. A very good sheriff might even be made sheriff of more than one county; so we find that sheriff Hugo, in Henry I's time, was not only sheriff of Berkshire, but of seven other shires. He was 'nominatus vir et carus regi[1].' A writ directed to a sheriff of this description would no doubt be attended to with energy and dispatch. But that was not all: a writ called a 'Praecipe' could be directed to the sheriff in any case raising a question of land wherever lying, or in cases of debts of the laity[2], and by the time of Glanvill the practice is settled that, if any one complained to the king concerning his fee or freehold, if the complaint were such as was proper for the determination of the king's court, 'vel dominus rex velit in curia sua deduci,' the writ was granted. This was such a grievance to the baronage that a clause in Magna Charta[3] appears expressly directed against it, but this policy was reversed by the Statute of Marlborough, ch. 29.

The 'staffing' of the local courts.

Writs to the sheriff.

The 'Praecipe quod reddat.'

[1] Pl. Ang.-Nor., p. 101.

[2] As opposed to debts supposed to be of a spiritual nature, e.g. as money due by legacy or on a promise of marriage.

[3] Mag. Char., c. 34.

The Praecipe was a writ returnable, as appears on its face, in the king's court, and it issued regardless of the question whether the local court had done justice or not, or had even been asked to do so. Glanvill preserves the form as follows:—

'Rex vicecomiti salutem. Praecipe *N* quod juste et sine dilatione reddat *R* centum marcas quas ei debet ut dicit et unde queritur quod ipse ei injuste deforciat, et nisi fecerit summone eum per bonos summonitores quod sit coram me vel justiciis meis apud Westmonasterium a clauso Pasche in quindecim dies ostensurus quare non fecerit: et habeas ibi summonitores et hoc breve.' Glan., lib. 10, c. 2. **For debt.**

'R. v. s. Praecipe *A* quod sine dilatione reddat *B* unam hidam terrae in villa (naming it) unde idem *B* queritur quod praedictus *A* ei deforciat et nisi fecerit, etc.' Glan., lib. 1, c. 6. **For land.**

If, however, it was not desired to 'evoke' the cause to Westminster, the king could, by issuing a writ of 'justicies,' direct the sheriff to try a case which as mere sheriff he might be unable to try. Under the writ he acted as a royal judge.

'R. v. s. Praecipio tibi quod justicies *N* quod juste et sine dilatione faciat *R* consuetudines et recta servitia quae ei facere debet de tenemento suo.' Glan., lib. 9, c. 10. **The writ of 'justicies.'**

As this writ was not returnable to Westminster, but stayed down in the sheriff's court, it was called 'vicontiel.'

Bracton's account is as follows:—

'Potest quidem vicecomes tenere plura placita quae non sunt ex officio vicecomitis sed vice ipsius regis et ex causa necessaria non sicut vicecomes sed sicut justitiarius regis si hoc ei specialiter mandetur[1].'

There is given in the 'Mirror[2]' a writ which looks like an early form of such a special mandate issuing either to a sheriff or lord of a fee.

[1] Bracton (Rolls Series), ii. p. 542.
[2] *Mirror of Justices* (Seld. Soc.), p. 10.

> 'Questus est nobis *C* quod *D* etc., et ideo tibi (vices nostras in hac parte committentes) praecipimus quod causam illam audias et legitimo fine decidas.'

Writs to the manor court.

The king also sent his writs to the manorial courts of the lords, and these are commands to the lord to do justice to the complainant in his court; and he is told that if he will not do justice,—'nisi feceris,'—the king's officer shall do it for him, and the king's officer was usually the sheriff.

The writ of right.

The manorial writs all had the 'nisi feceris' clause. The most important was the writ of Right (breve de recto tenendo), which issued when the right of *property* in land was in dispute, or rights of an incorporeal nature issuing from land, e.g. rent or services. It was directed to the lord or proprietor of whom the land was held, and took its name from the words which commenced the writ. 'Praecipio tibi quod sine dilatione *plenum rectum teneas N* de decem carucatis terrae.' 'Rectum' means the full right of 'property' as opposed to 'possession.'

The precedent given in Glanvill is as follows:—

> 'Rex comiti *W* salutem. Praecipio tibi quod sine dilatione teneas plenum rectum *N* de decem carucatis terrae in *M* quas clamat tenere de te per liberum servitium (or whatever the tenure was) quas *R* filius *W* ei deforciat. Et nisi feceris vicecomes de *N* faciat ne amplius clamorem audiam pro defectu justitiae.' Lib. 12, c. 3.

The 'nisi feceris' clause.

The 'nisi feceris' clause is not invariably found before the form of the writ becomes settled, but then always. It was not always the sheriff who was to act: it might be 'barones mei de Scaccario faciant fieri' (Pl. Ang.-Nor. 127), or 'justicia mea et vicecomes faciant' (ibid. 130). Indeed, in one writ directed to the sheriff himself in his administrative capacity ordering the protection of certain rights, it proceeds, 'et nisi feceris justitia mea faciat.'

The lord is thus made to appear a mere officer of the king;

and the fact that Henry II ordains that no one is to be put to answer for his freehold *without a king's writ*, indicates the downfall of the manorial jurisdiction.

The writ of right 'quia dominus remisit curiam.'

According to Fitz Herbert (Nat. Brev. 23) the lord might give a license to his tenant to sue his writ of right in the king's court, 'remitting his court' for that time to the king's court, whereupon the writ issued 'quia dominus remisit curiam,' returnable before the Common Pleas. If this clause were put in the writ, it was immaterial whether the lord had assented or not. A lord could also adjourn a case of difficulty into the king's court, when, says Glanvill, he was said 'curiam suam ponere in curiam domini regis,' and having got direction there, went back and tried the case in his own court[1].

A writ might be addressed directly to a defendant directing him to do what the plaintiff required, frequently on pain of a fine for disobedience[2], or concluding with the menacing words 'et vide ne inde amplius clamorem audiam[3].'

The allegation of 'contra pacem Domini Regis.'

We have mentioned that thefts, scuffles, blows, and wounds were within the jurisdiction of the sheriff or the manorial court, but Glanvill[4] says, 'to the Sheriff in the county court pertains the cognizance in case of failure of justice in the manorial courts of scuffles, blows, and wounds, *unless the plaintiff allege that the act was* 'de pace domini Regis infracta.' This short expression prevented the defendant pleading to the jurisdiction. The result was that if any complainant alleged in his action, criminal or civil, that the wrongful act was done 'contra pacem domini Regis,' the king's court took cognizance of it, and the sheriff's jurisdiction was ousted. So in 1195 an action for carrying off turf 'contra pacem vi et armis' goes to the king's court[5].

[1] Lib. 8, c. 11.
[2] Pl. Ang.-Nor., p. 95.
[3] Ibid., p. 93.
[4] lib. 1, c. 2.
[5] Pl. Ang.-Nor., p. 285. Although I follow Mr. Bigelow in this, I am not sure that the example is a good one. The defendant is accused of 'roberia' and 'felonia,' and was thus brought inside the 'pleas of the Crown.'

CHAPTER VI

THE DECLINE OF THE LOCAL COURTS (CONTINUED).

THE GRAND AND PETTY ASSIZES

The Grand Assize.

In Henry II's reign two further blows were struck at the inferior jurisdictions. At some time, the date not being exactly known, perhaps at the same time that he instituted the Petty Assize, Henry issued the Grand Assize, which was to the effect that if an action for the *property* in land was brought in the feudal court, the defendant might have the action removed into the king's court and the whole question of title determined by his neighbours, thus ousting the manorial jurisdiction altogether. The tenant 'put himself on the Grand Assize[1],' i.e. on the verdict of twelve knights.

This *proprietary* action was commenced, as has been pointed out, either by the writ of right, or the 'praecipe quod reddat,' and if commenced in the lords' court could be 'evoked' to the king's court. This action, though it finally disposed of the question of title, was extremely tedious, for the tenant in possession might call his warrantor, and he his, and so on backwards, and if the tenant was a minor that fact might hang the suit up for twenty years, when it would be settled by battle or by the verdict of the Grand Assize.

The Petty Assizes, *Novel Disseisin*.

In 1166 Henry issued the most important Petty Assize, the Assize of *Novel Disseisin*, which provided that if *A* is disseised of his free tenement unjustly and without a judge-

[1] Cf. Stubbs, *Sel. Ch.*, pp. 161 sqq., and infra, c. xxi.

ment he is to have a remedy by royal writ and a jury is to be impanelled to answer this question of fact. If they answer that the plaintiff has been disseised, the plaintiff is to be restored to his seisin.

> 'Assisa venit recognitura si Galfridus Comes de Pertica injuste et sine judicio disseisivit Jacobum Clericum de libero tenemento suo in Chaltona post primam coronacionem domini Regis.
> Juratores dicunt quod comes disseisivit eum
> Judicium: comes in misericordia et Jacobus habeat seisinam suam.'

The record.

If they say 'non disseisivit eum,' the judgement is 'Jacobus in misericordia pro falso clamore [1].'

The importance of this ordinance lies in this, that in the first place *possession* as opposed to *property* is to be protected by a rapid remedy, and secondly that the seisin of a free tenement is protected by the *King*, no matter of what lord it is held. And in this Assize as in the Grand Assize the tenant had the inquest on recognition of his neighbours.

Mort d'ancestor.

It will be noticed that this Assize does not help the heir of the disseised man, nor will it lie against the heir of the disseisor. The remedy was accordingly extended by the Assize of *Mort d'ancestor* [2], the principle of which was that if *A* has died seised as of fee, that is, the title being descendible to his heir, *B* his heir is entitled to be put into possession as against every man. If *C* has a better title he must assert it by an action at law, but he must not come and forestall or turn the heir out and help himself.

> 'Assisa venit recognitura si Johannes pater Rogeri de Suttona fuit seisitus in dominico suo ut de feodo die qua obiit de una carucata terrae cum pertinenciis in Westona; et si obiit infra assisam et si idem Rogerus proximus heres ejus est. Quam terram Thomas de Nortona tenet.

The record.

[1] Pipe Roll Series, *Rolls of the King's Court in the Reign of Rich. I*, xxxii–xxxvii.

[2] Assize of Northampton (1176), c. 4.

'Juratores dicunt quod non obiit inde seisitus [*or* quod Rogerus non est proximus heres suus].

'Judicium: Rogerus in misericordia, et Thomas teneat quietus.'

These Assizes were not the first in order of date. Two earlier ordinances affected the interests of the Church—the Assize of *Darrein Presentment* and the Assize *Utrum*. Their date of origin is obscure: they are both referred to in the *Constitutions of Clarendon* (1164), and there is evidence that something like the latter was known in the time of Stephen.

Darrein Presentment. The first dealt with advowsons. The king says that he who presented last time shall present this time also, but without prejudice to any question of right. The neighbours are summoned to declare who presented last.

'Quis advocatus tempore pacis presentavit ultimam personam quae mortua est ad ecclesiam de Westona cujus advocationem Rogerus de Suttona petit versus Thomam de Nortona.'

The institution of this Assize had two edges, for the king claims as against the Church that such litigation is temporal, and as against his feudatories that it belongs to the king's court[1].

The Assize *Utrum.* The Assize *Utrum*[2] was employed in the following case. The Church claimed for her courts all litigation about land which had been given by way of alms to her, and the preliminary question naturally arose whether in any particular case, as a fact, the land in question was lay or not. The impartial country-side was then called upon to say 'yes' or 'no' to that question.

These Assizes are commenced by the plaintiff getting the royal writ directing an inquiry and directing the impannelling of the twelve 'legales homines.'

Thus partly by the writ process and partly by employing the fiction of the king's peace in an action for trespass the

[1] Cf. *Const. of Clar.*, cap. i. [2] Ibid., cap. ix.

royal courts obtained the control of ordinary litigation which they have never since lost.

The sheriff's jurisdiction was doomed also. The sheriffs were in some cases hereditary officials, and although a few of them were satisfactory,—some of them were justices of the king,—the system had not proved a success, and a crisis came when Henry II (in 1170) ordered the Inquest of sheriffs[1] and removed all of them from their offices, acting on the grave complaints which he heard on all sides of their misconduct and extortion 'pro eo quod male tractaverant homines regni sui[2].' Magna Charta said that the sheriffs were not to hold pleas of the crown · that swept away the most important part of their criminal jurisdiction[3], and in the reign of Edward I almost the last blow was given, for by a clause in the Statute of Gloucester, 1278, it is provided that no one is to have a writ of trespass in the king's court unless he will affirm that the goods taken away were worth 40*s*. at the least. This was ingeniously construed to mean that no action for more than 40*s*. should be brought in a local court, or at any rate that the suitor must take out a royal writ to the sheriff without which the sheriff could not act. As the writ issued from the king's court and had to be paid for, it was just as cheap to go straight to the king's court and try the action there.

By the Provisions of Westminster (1259), confirmed by the Statute of Marlborough (1267), no lord may compel his freeholder to swear against his will; the lord cannot therefore impannel a jury of freeholders without their consent; the

[1] Stubbs, *Sel. Ch.*, p. 147.

[2] Pl. Ang.-Nor., p. 216. See, however, that the chronicler says that the king replaced some of them, 'atque ipsi postea multo crudeliores exstiterunt quam antea fuerunt.'

[3] This clause was held apparently to apply only to 'hearing and determining,' and not to the sheriff's power to take indictments in felonies and misdemeanours and imprison thereon. This was set at rest by 1 Edw. IV. c. 2, which gave this authority to justices of the peace only.

king both could and did. Moreover it is also provided that none but the king may hold a plea of false judgement, thus no appeal lies from lord to overlord, and the overlord's court became valueless[1].

The 'Tolt.' A cause was removable into the county court from the lord's court, either for defect of right or with the lord's consent by the sheriff's precept called a 'Tolt,' 'quia tollit et eximit causam e curia baronum.'

Writ of 'Pone.' If the king's court desired to call up a cause from the sheriff's court, it did so by a writ of 'Pone.'

> 'Rex vicecomiti salutem. Pone coram me vel justitiis meis die etc. loquelam quae est in comitatu tuo inter *A* et *N*, etc.' Glanv., lib. 6, cc. 6, 7.

Error. If after judgement in an inferior court it was sought to establish error, the record was ordered up to Westminster to be examined for errors on its face. If, however, this court had not the privilege of keeping a record—some county courts had and others had not, the itinerants are said not to

Writ of 'recordari facias.' have had it—the judges were directed to make a record and bring it up.

> 'Praecipio tibi quod recordari facias in comitatu tuo loquelam, etc.' Glanv., lib. 8, cc. 6, 7.

[1] 52 Hen. III, cc. 19, 23.

CHAPTER VII

THE CIRCUIT SYSTEM AND THE CENTRAL COURT

The 'Missi.'

We must now notice the methods by which the royal justice was brought close to the people. William I had occasionally sent down somebody from his court to try an important case, and Rufus sent down into the west Bishop Walkelin and his chaplain Flambard and two others, to hold royal pleas in Devonshire, Cornwall, and Exeter[1].

The record says 'ad investiganda regalia placita,' but it is probable that the words 'regalia placita' do not mean 'pleas of the crown' in our sense, but royal business generally; at any rate the royal business that they did, of which we have a record, is to hear a suit on behalf of the king for a certain manor which was held by the Abbot of Tavistock. But everything has a beginning, and one is not surprised to find that the practice of sending judges into the country to do the royal business grew.

The 'itinerants.'

Henry I sent itinerants, for we have a record in the thirty-first year of his reign which exhibits a system of iters in full working order[2]. Their commission was to clear the gaols, to hear pleas of the crown, and take pleas of realty up to a certain value. Henry seems to have been rather active in the administration of justice, for we find in the Anglo-Saxon Chronicles of 1124[3] the following entry: 'In the same year, after St. Andrew's Mass, before Christmas, Ralph Bassett and

[1] *The King* v. *Abbot of Tavistock*, Pl. Ang.-Nor., p. 69.

[2] Stubbs, *Const. Hist.*, i. 391.

[3] Stubbs, *Sel. Ch.*, p. 98.

the king's thegns held a "Gewitenemote" at Hundehoge in Leicestershire, and there hanged so many thieves as never were before, that was in that little while, altogether four and forty men, and six men were deprived of their eyes and emasculated'; and in the chronicle of 1135: 'The king died on the following day after St. Andrew's Mass Day in Normandy. Then there was tribulation soon in the land, for every man that could, forthwith robbed another. A good man he was, and there was great awe of him. No man durst misdo against another in his time. He made peace for man and beast. Whoso bare his burden of gold and silver, no man durst say to him aught but good.' But Henry did not endeavour to diminish the importance of the county court. On the contrary, somewhere between 1108 and 1112, he issued an order to Bishop Sampson and the sheriff of Worcester, directing them and every one else to go to the county court and the hundred court as they had done in the time of King Edward[1].

Henry II and the circuit system.

The reign of Henry II was of still greater moment to the history of English law. In 1176 Henry II made six circuits of three judges, and two years afterwards made an inquiry if the system had worked well, and found that it had given great dissatisfaction; so he recalled his eighteen judges, and took a very important step. He appointed five men, two clerics and three laymen, who were not to depart from the king's court, but were to hear all the complaints of the people[2]. Questions that they cannot decide are to be reserved for the king and his wise men.

His central court,

This court apparently sat term after term, usually at Westminster, but sometimes at the Exchequer, and Glanvill was one of the judges. Next year he divided England into four parts, and to each part sent 'viros sapientes ad faciendam justitiam[3].' The commissions of the former itinerants had

[1] Stubbs, *Sel. Ch.*, p. 104. [2] *Bened. Abb.* (Rolls Series), i. 207.
[3] Hoveden, ii. 190 (Rolls Series).

been limited: cases of difficulty were to be reserved. If this was the case now it is curious that the judges of the northern circuit seem to have been the king's justices from London.

or 'the Bench.'

It is proper, however, to say that the precise relationship between these itinerant judges and the five who were sitting in London is disputed. But it is certain that most judges who go journeying through the country are of less importance than the judges who stay in London. The judges who stay in London are the justices who hold pleas before the king. We find in the second year of John that the Abbot of Leicester, being sued before the justices of the Bench, pleaded a charter of exemption from suit except before the king, and his chief justiciar. Held: the pleas before the justices of the Bench were before the king[1].

It did not follow that the justices who were sent out itinerant were lawyers in our sense of the term at all, for we read in Ralph de Diceto that Henry was making experiments: 'now he sends out abbots, now earls, now chaplains, now men of his household, now his most intimate companions, to hear and try cases'; and he ended up by appointing, though apparently merely for a time, the Bishops of Worcester, Ely, and Norwich, as arch-justiciars[2] of the king.

Distinction between (a) *capitalis curia regis*, (b) Exchequer, (c) Great Council, (d) itinerants.

Before the end of his reign we have a permanent central tribunal of sworn judges. It is *capitalis curia regis*: it must be distinguished from the Exchequer, for though it often sits in the Exchequer, and many of its number are members of the Exchequer, it has a seal of its own; and it must be distinguished from the King's Council because difficult matters are reserved for the king and his wise men; and it holds pleas 'before the king,' whether the king is in England or not. The itinerants go regularly: they probably sat under various commissions, and they could be summoned up before the central court to give an account of their doings, though

[1] Abbrev. Placit., 2 John, p. 32.
[2] Rad. de Diceto, i. 434 (Rolls Series).

frequently they had a member of the central court travelling with them. Glanvill, lib. 8, c. 5, distinguishes between 'capitalis curia regis' and the 'justiciarii itinerantes,' although these latter form a 'curia regis coram justitiariis itinerantibus[1].' Itinerants, says Bracton, are sometimes appointed 'ad omnia placita,' sometimes 'ad quaedam specialia.'

Henry's own share in the administration of justice was not trifling. When he was in England he apparently frequently sat in court himself, and he went in eyre sometimes, and this was a court 'coram domino rege.' At Clarendon there is an account of a suit between the Abbot of Battle and Gilbert of Balliol. The justiciar was there, but Henry intervened in the discussion, upholding the validity of the royal charters produced by the abbot, and swearing that such charters cost him dear. Nevertheless judgement was given by the unanimous voice of the court, and not by the voice of the king. On another occasion[2], the charters being conflicting, Henry observed that they contradicted each other, and that he could make nothing of them, and flung out of court, saying that he must keep who can.

> '"Nescio quid dicam: nisi ut charte ad invicem pugnant."
>
> 'Rex vero iratus inde et indignans, surrexit et recedendo dixit, "Qui potest capere capiat," et sic res cepit dilacionem, "et adhuc sub judice lis est."'

On another occasion the monks of St. Alban's declared that he showed a wisdom equal to that of Solomon when he declared that the unsealed land-books of the Anglo-Saxon kings were as good as sealed because they were confirmed by a sealed charter of Edward the Confessor.

In the reign of John we find that in Magna Charta there is a clause demanding that judges superior to the itinerants should be sent down to the Assizes four times a year, which

[1] Select *Pleas of the Crown* (Selden Soc.), Introd. pp. xi sqq.

[2] *Archbishop of Canterbury* v. *Abbot of St. Edmund*, Pl. Ang.-Nor., p. 238.

makes it appear that the royal justice is becoming extremely popular. The point of the request, it is suggested, was that the itinerant justices were frequently, most of them, knights of the shire, and that the decision of a royal judge from the central court was preferred in these important matters.

Very early in John's reign we notice that the *capitalis curia regis* is showing, as the learned editor of the *Select Pleas* says, not a cleft, but a line of cleavage. A distinction is recognized between pleas held before the king himself, and pleas held before the justices of the Bench who seem to have been sitting regularly at Westminster in the sixth, seventh, ninth, and tenth years of John. The king may have been away at times, but the courts do not coalesce when the king is back again at Westminster, nor is it certain that an action commenced in one division may not be adjourned into the other. They both are *curia capitalis*.

The Great Eyre.

By the side of the itinerant justices we have an institution which must not be confused with it, that is, the great eyre, which went through the country irregularly, and in the time of Henry II went once in seven years. It took business of all sorts, not merely judicial; it is possibly correct to say that the least important part of its work was the hearing of pleas. It journeyed through the country investigating the whole system of administration. Before the judges started on their travels they were given a set of interrogatories, which are called the articles of the eyre—the *capitula itineris*—and answers to these interrogatories were required from a jury of the neighbourhood. They were, we might say, commissioners of revenue; they were also criminal judges, but in those times matters of crime and matters of revenue are very intimately connected.

We have, thanks to Professor Maitland, the account of the eyre in the county of Gloucester, 1221, and we find in the Bishop of Oxford's *Select Charters* the inquisition of 1194 including the extent of the king's demesne lands, questions

about murder, robberies, escheats, wardships, marriages, widows, Jews, churches, and other sources of royal revenue[1]. In 1198 we have another list including questions as to vacant churches, usury, treasure trove, purprestures, fugitives, weights and measures, and customs. The jury of the hundred to whom these questions were put have time to make their answer, and when they have made up their minds they make their presentments, and these presentments make up the record, and the entries are 'dicunt,' 'sciunt,' 'nesciunt,' 'malicredunt,' and in accordance with the answers fines and amercements are levied, which go into the treasury of the king.

It is said that these eyres were so grievous and oppressive to the people, that sometimes on the rumour of their coming the inhabitants fled from their homes. It is possible that the great eyres were a substitute for the great progresses which the King and his Court used to make through the land. In any case they must be distinguished from the purely judicial commissions, in that they were to a great extent concerned with the king's revenue[2].

The Common Pleas stay in London.

The provision in Magna Charta that the Common Pleas are not to follow the king was aimed at a very real grievance. Whether the object was to prevent the Exchequer holding these pleas, or not[3], it is certain that if anybody desired to have the advantage of the royal justice, he might have to make long and wearisome journeys, following the king in his progresses, which were extremely long, and which might even take him out of the country into France: he would have to go attended by his witnesses ready to prove his case, and wait till he could get a day for the hearing.

Difficulties such as these made it impossible for any but the most leisured or the most wealthy to embark on a suit in

[1] Stubbs, *Sel. Ch.*, p. 258.

[2] For the difference between a great eyre and a judicial eyre, cp. Stubbs, *Sel. Ch.*, pp. 258 and 358.

[3] Cp. 28 Edw. I, c. 4.

the King's Court with any hope of a satisfactory result. The Common Pleas, therefore, are not to follow the king any longer, but they are to be held in 'a certain place,' and that certain place was Westminster, where the Court of Common Pleas sat from the time of Magna Charta down to the day when the new courts of justice were opened at Temple Bar.

When Henry III began to reign he was an infant, and could not hold pleas, and the 'Bench' sat regularly at Westminster for the dispatch of civil and criminal business, and there was no king for any pleas to follow. But when he came of age he made progresses with judges in attendance, and pleas were heard 'coram rege,' and then two sets of Plea Rolls definitely appear, the Coram Rege Rolls, and the De Banco Rolls.

Cleavage in the Curia Regis.

So when Edward I comes to the throne we have the Curia Regis, or the Court which holds pleas before the king, or the King's Bench as we should call it; we have the Exchequer which ought to be attending to the fiscal interests of the Crown, but which likes to dabble in other and more profitable business, and is forbidden to do so by Edward, and we have the Common Pleas, or as it is known at that time, the Common Bench.

CHAPTER VIII

THE ENGLISH JUSTINIAN

Edward I: his settlement.

THE reign of Edward I was remarkable not only for its legislative activity, but for what is more important for our purpose, the changes in the administration of justice which appear for the first time, and which left our judicial institutions in the form in which, with very slight alteration, they remained to the year 1875. Of Edward I Blackstone says, 'in his time the law did receive so sudden a perfection that Sir Matthew Hale does not scruple to affirm that more was done in the first thirteen years of his reign to settle and establish the distributive justice of the kingdom than in all the ages since that time put together'; and Sir James Mackintosh says that 'from the reign of Edward I we possess the Year Books, notes of cases adjudged by the courts who exclusively had the power of authoritative interpretation.'

In the next century elementary treatises, digests, and works on special topics appear, written by Littleton, Fortescue, and Brook. 'So conspicuous a station at the head of our uninterrupted jurisprudence has procured him the name of the English Justinian.' 'Absurdly enough,' says Lord Campbell, 'as the Roman Emperor merely caused a compilation to be made of the existing laws, whereas the object now was to correct abuses, to supply defects, and to remodel the administration of justice.'

The Curia Regis now broke up definitely into three bodies.

It had been separated into distinct tribunals doing a distinct work for some little time. With the Exchequer attending to the revenue, and the Common Pleas or Common Bench sitting at Westminster, the process of disintegration had commenced. In Henry III's time a further step had been taken. The great line of Justiciars which presided over the kingdom in the king's absence came to an end, and Robert Bruce was appointed 'capitalis justiciarius ad placita coram rege tenenda' on March 8, 1268. In Edward I's reign, 1278, Ralph de Hengham was appointed Chief Justice of the King's Bench, Thomas de Weyland Chief Justice of the Common Pleas, the king allowing them a salary of only sixty marks a year, but 'adding a small pittance to purchase robes, and stimulating their industry by fees on the causes they tried.'

The Exchequer, which from the beginning had been a financial department, became more exclusively so in Henry III's reign. The Chancellor and the Justiciar are there, but they gradually withdraw. A new official called 'the treasurer' is the head, and from the beginning of Henry III's reign men are appointed to the Exchequer under the title 'Barons of the Exchequer.'

The Court of the King's Bench travelled about the country, and the Chief Justice Hengham was stationed from time to time at Winchester, Gloucester, York, and other places. The king went abroad to Aquitaine, and stayed there over three years, and on returning in 1289 found that his new judges had been misconducting themselves. It was alleged that the Lord Chief Justice had not only taken bribes himself, but had connived at his brother judges doing the same. The king thereupon without inquiry threw them all into prison. They were examined at the bar of the House of Lords: they were all found guilty except two, dismissed, and heavily fined, and their successors were required to swear upon entering office 'that they would take no bribe, nor money, nor

gift of any kind from such persons as had suits depending before them,—except a breakfast[1].'

The King's Bench.

The business of the King's Bench was to correct all crimes and misdemeanours that amount to a breach of the peace, the king being then plaintiff, for such are in derogation of the *jura regalia;* and to take cognizance of everything not parcelled out to the other courts. It also had superintendence of the other courts by way of appeal, thus 'error' lay from the Common Pleas to the King's Bench. It followed the king, the style of the court was 'coram ipso rege,' and its records are called 'coram rege rolls.' The Chief Justice was assisted by three puisne judges, and they formed the staff of the King's Bench.

The Common Pleas or Common Bench.

The Court of Common Pleas decided all controversies between subject and subject. It sat at Westminster and its records were called the 'de banco rolls.'

The Exchequer.

The Exchequer was a board of revenue which sat to hear, and determine matters in which the king's revenue was concerned, to adjust and recover his revenue, the king being plaintiff, as such matters touch his *jura fiscalia.* In later times the Court of Exchequer developed two sides, the common law side, which sat for the benefit of the king's accountants, and there the proceedings on the writ of *Quominus* were heard, and the equity side, formed by the Lord Treasurer, the Chancellor of the Exchequer, the chief baron and three puisnes which called the king's debtors to account by a bill filed by the Attorney-General. The equitable jurisdiction was taken away in 1842, when two new Vice-Chancellors were appointed to do the work so liberated. This did not, however, affect the jurisdiction of the Exchequer in revenue cases, where law and equity had always been concurrently administered (*A.-G.* v. *Halling*, 15 M. & W. 687).

[1] Campbell, *Lives of the Chief Justices*, i. 75.

The Great Council.

There is, meantime, an important development proceeding in the King's Council. The Council of wise men had, from the earliest Norman times, always been consulted by the king in cases of difficulty. So in the case of *Abbot Gausfrid* v. *Abbot of Marmoutier*, the defendant comes over to try and subject the Abbot of Battle to his jurisdiction, and tries to approach the king privately *per internuntios sagaciter*. The king, though much inclined to help, thought that he had better say nothing finally, *absque consilio*. Before the Council the abbot alleged a gift from King William. The Council requires to see the deed of gift. The abbot says that the king's word is good enough: 'No,' says the Council, 'in so great a matter we must have either a charter or witnesses viva voce[1].' Council and Parliament.

So also in the case of the widow and eldest son of Hugh Bigot in 1174. This was a claim to estates: both parties approach the king with money. The king, however, directs a hearing before the earls and barons[2]. So in the time of Henry II and Henry III any orders or writs which are without precedent are made *de consilio curiae*.

But in the reign of Edward I, a new body makes its appearance under the name of the Parliament, and we have the record of the Parliament of 1305 published in the Rolls Series with an introduction by Professor Maitland. This was in the thirty-third year of Edward I in the month of February. It was a full Parliament: the three estates of the realm met, the King and his Council, in all about six hundred men. Besides, there were thirty-three members of the King's Council to whom, not being prelates or barons, writs were sent, and others were summoned to advise the king from their special acquaintance with Scotch and Gascon affairs. The Parliament of 1305.

[1] Pl. Ang.-Nor., p. 122. [2] Ibid., p. 230.

This assembly kept together for three weeks, and on the 21st of March proclamation was made that the archbishops, bishops, and other prelates, earls, barons, knights, citizens, and burgesses might go home, (but they must be ready to come again, when wanted,) 'sauve les Evesques Contes et barones justices et autres qui sount du conseil nostre seigneur le roy'; which we may suppose, as Mr. Maitland says, must have been an intelligible order to those to whom it was addressed. Those persons still remained who had business to transact, and Parliament remained in session till the 6th of April, on which day the 'dominus Rex' is still *in pleno Parliamento*[1].

The composition of the Council.

It is very uncertain what the composition of the King's Council was, but there were thirty-three men who were not barons or earls, summoned by name. They included the Chancellor of the Exchequer, the Justices of the two Benches, the Barons of the Exchequer, several 'itinerants,' and thirteen clerks of the Chancery. The Chancery is the great secretarial department, and does the king's writing, foreign and domestic.

The other great administrative department is the Exchequer, over which the Chancery had some control. These thirty-three men represent the legal, official, and administrative talent of the country. If we knew the names of the other councillors who attended on being summoned as prelate or baron, such as the Chancellor, who comes as Dean of York, we should have a nearly complete list of the Council, but even then the names of some nobles who were out of favour would be absent. Professor Maitland has compiled a list of names from a comparison of the signatures of those who, before and after the dismissal of the estates, witnessed the king's charters. The names occur of Walter Langton Bishop of Lichfield and Treasurer, Antony Beck the great fighting Bishop of Durham, John Halton Bishop of Carlisle, and the Bishop of Salisbury, the Earls of Lincoln, Gloucester, Hereford, Warwick, and

[1] *Mem. de Parliamento*, p. 293 (Rolls Series).

Carrick, Henry Percy, Hugh Despenser, and Robert Clifford, both justices of the forest, John of Brittany, and Aymer de Valence, the king's best generals. These men were all of them important officials[1].

This meeting of the Council is, at the least, a full meeting of the King's Bench, the Common Bench, the Exchequer, the Chancery, the War Office, and the Wardens of the Marches.

Work done by the Parliament.

The business which was done in this Parliament was (1) the discussion of foreign affairs, Scotch and Gascon; (2) legislation; (3) taxation; (4) audience of petitions; (5) judicial business, criminal and civil.

With the first three topics we are not much concerned, nor is there much to note. With regard to legislation no statute appears at once on the statute roll, but there are a few acts of a legislative character. There is an *ordinatio Forestae*, merely a royal answer to a petition: there is an ordinance of inquests 'ordained by the king and his whole council.' There is a curious entry 'de asportis religiosorum.' 'The king in full parliament with full consent of the barons, &c., and others of the realm has ordained as follows'—and then comes a blank. The explanation given of this is that the papacy at that time was vacant, and it may have been desirable to keep the question dealt with in a state of abeyance. In any case it was formally re-enacted two years later at Carlisle, and appears on the statute book.

The ordinance of Trailbastons, i.e. clubmen, was also passed whereby the king appointed justices to inquire and hear and determine divers felonies and trespasses, and the

[1] Doubtless the king was entitled to call on any of his lieges to give him faithful counsel, a duty when travelling was difficult, both onerous and inconvenient. As late as 16 Edw II, Henry de Beaumont, a baron, being summoned to a council and asked his advice, disrespectfully declined to give it. The king angrily ordered him to leave the council. He did so, remarking that he would sooner be out than in. For this refusal and contumely he was committed to prison (*Rot. Lit. Claus.*, 16 Edw. II, m. 5 d.; Plac. Abb., p. 342).

commissions then issue[1]. But this is not legislation properly so called, for the king always had large powers of issuing commissions. It was rather a great measure of police, for the purpose of dealing with vagabondage. Of taxation there was apparently none, although the king was very poor. A petition from the justices of both benches and the barons of the Exchequer and the clerks asking for their salaries was met by the answer 'Quod Thesaurarius et Barones solvant quando poterint.'

The Petitions.

The Audience of Petitions touches us more nearly. The greater part of the roll is taken up with entries on this subject. The petition, which is addressed to 'our lord the king,' or to 'our lord the king and his council,' not, it will be observed, to 'parliament,' is on a small slip of parchment, with the answer endorsed on the back.

The method of dealing with these petitions was as follows. In the eighth year of Edward I the multitude of petitions was a great hindrance to business. They are, therefore, to be sorted and only those of great importance are to come before the king. In the twenty-first year of Edward I these petitions are to go to Receivers, who examine and who are to put them into five bundles; (1) for the Chancery, (2) for the Exchequer, (3) for the Estates, (4) for the King and Council, (5) those which have been already answered. In this year, 1305, the king appoints three committees to deal with Gascon, Scotch, and Irish petitions, but there is no trace of any committee for England. In 1315 three committees are in existence, one for England, one for Gascony, and the Isles, a third for Ireland and Scotland. The English committee was composed of three bishops, two barons, a justice, a baron of the Exchequer and a clerk of the Chancery. Some petitions from their importance are reserved for the king or the whole council. This is indicated by the words 'coram rege' or 'coram consilio,' preceding the answer and in a

[1] See Palgrave, *Parl. Writs*, i. 408.

different handwriting. A clerk having enrolled the petition in the Parliament Roll, sends the original off to Chancery. There the chancellor seals a writ or a charter, finding his authority in the endorsement on the petition. The endorsement is the order.

What is a Parliament?

These petitions are not presented *to* Parliament but *at* a Parliament. A Parliament, says Professor Maitland, is rather an act than a body of persons at this time, and, as yet, any meeting of the council that has been summoned for general purposes; the term is not yet appropriated to colloquies of the king with the estates of the realm, much less to the assembly of the estates. The petitions are not for anything like legislation, but for things which the king can legally grant either for justice or for grace. The answers are mainly remissions of the questions to those persons or courts which have proper cognizance of such things.

Procedure on Petitions.

This is not mere waste of time. If *A* desires to bring an action against his neighbour, he must go to the clerks in Chancery, and if it is an ordinary case, a writ *de cursu*—'of course'—will be issued, presumably on payment of a fee. If at all unusual the Chancellor will do nothing without a warrant from the King or Council, and the warrant is noted at the foot of the writ[1]. So if *A* wants relief from the Exchequer he goes to the Council for an endorsement on his petition. He takes that to the Chancery, and gets a writ there; that goes to the Exchequer, where, after it has been enrolled in each office, the treasurer and barons will begin to consider whether relief is proper or not.

Apparently sometimes the petitioner was required to appear and support his petition, and failing that, it might be dismissed. Sometimes a knight of the shire presents the petition of his constituency and supports it, for such petitions come, and also from religious houses, universities and boroughs. So too the assembled 'good men' petition the

[1] *Mem. de Parl.*, no. 251, p. 158.

king. All these petitions are jumbled up together, for between a petition of Roland of Okestead and one of the city of Lincoln we find the 'poor men of England' complaining that juries are corrupted by the rich, and that ecclesiastical judges meddle with temporal suits. To this the king answers that the ordinary process is sufficient, the corrupt jury may be attainted, the ecclesiastical judges may be prohibited [1].

Differentiation in Petitions.

Later we perceive a difference. Petitions by 'the community of the land' will be inrolled with the royal answer, petitions to either House will also be inrolled, if the assent of the King and both Houses has been given. Ordinary petitions to the King and the Council will not be inrolled, i. e. petitions of those who have grievances. The business which we find the Commons doing is two petitions, which were refused, and their joining in the statute *de asportis religiosorum*, which was temporarily hung up. This is not important activity, but no doubt they were useful as checking the official reports of what was going on throughout the country, and indeed the writ of summons calls them 'in order that they may do what shall be ordained.'

The Commons as yet not important.

Judicial business before the King in Council in Parliament.

The judicial business of the session was scanty. Nicholas Segrave was tried for treason. He confessed. Edward asks the Council what punishment should be awarded, and the answer is 'Death'; but the king is content if he finds seven manucaptors to undertake that he should come up when called on. It is said that the Council discussed this matter for three days. The citizens of Salisbury resist a tallage imposed by a bishop under a charter of Henry III. They are summoned. They send four representatives: among them their two members. They plead. There is a discussion before the King and the Council. Judgement goes against them. In St. Amand's case certain great people undertake before the Council to produce the defendant before the king, when called on. Then there are proceedings in the King's

[1] *Mem. de Parl.*, no. 472, p. 305.

Bench thereon, from which we may infer a close connexion at that period between the Council and that Court.

The rise of the High Court of Parliament.

The real point of interest and difficulty is, as Professor Maitland says, the question as to what the jurisdictional competence of the Council was at this time, and the relation in matters of Judicature between Council and the nascent House of Lords. Every High Court must have a separate set of Rolls. Leaving out of sight the Chancery, the Exchequer, and the Itinerants, we may say that Henry III had two courts, the Bench with the 'de banco rolls,' the King's Court with the 'coram rege rolls.' This last follows the king about, and for ordinary purposes consists of professional justices, while later the chief justice is definitely appointed to hold pleas before the king, but on occasion it could be reinforced by the king's councillors, barons, and earls. This body is superior to 'the Bench,' for 'error' lay to it from 'the Bench.' But a new set of plea Rolls begins to appear, not purely for pleas, for we find that petitions and other things are on it. The court which is to be above the King's Bench is being evolved, and its Rolls are the Parliament Rolls. For a time it is hardly distinguishable from the King's Bench. It is really an afforced form of the King's Bench, and this is made certain by our finding that a plea may be adjourned from a Parliament to the King's Bench or vice versa without breach of continuity.

Thus two tribunals become three: Bracton knows two (f. 108). Fleta knows three (p. 66): 'justices resident at the bench,' 'justices who fill the king's own place,' and another, 'habet enim rex curiam suam in consilio suo in parliamentis suis, praesentibus praelatis, comitibus, baronibus, proceribus, et aliis viris peritis ubi terminatae sunt dubitationes judiciorum et novis injuriis emersis nova constituuntur remedia, et unicuique justitia, prout meruit, retribuetur ibidem.'

It is useless to ask if this is Council or House of Lords.

It is the King in Council; it is the King in Parliament, for its sessions are parliaments.

The King in Parliament and the King in Council.

The future settled that the highest court of ordinary jurisdiction should be the King in Parliament, and this should mean the House of Lords, and should be mainly a court of error, and that the King in Council should dispense extraordinary justice, both civil and criminal, on a large scale. Whether the elastic and extraordinary nature of the Council jurisdiction was cause or effect, it is noticeable that the Parliament keeps a proper Latin plea roll and the Council keeps none, and this was alleged as a ground of complaint against the Star Chamber by the Act which abolished it[1].

Long ago the Parliament Roll left the custody of the Council, to become the record of the estates of the realm, and those who used to be official members of the Council, such as the judges, and who are still summoned to Parliament without being peers of the realm, attend as 'mere assistants' without a vote, and must not speak unless asked.

But at this moment this third great court partakes of the nature of House of Lords, Council, and King's Bench. It is an afforced form of the King's Bench, yet superior to it; it is sometimes a court of first instance, though why is a matter of speculation in each particular case. It is consulted when new remedies are required by the Chancellor, and, if the passage in Fleta means anything, its jurisdiction was what we should call equitable, foreshadowing the jurisdiction of the Council's important legal official, the Chancellor.

Parliament and Council begin to separate.

The period is important and interesting, for the moment when petitions divide into those which are entered on the Parliament Roll, and those which are not, is the moment when the functions of Parliament and Council begin to differentiate themselves; the King in Parliament is the Legislature, the King in Council is the Executive, and the depositary of extraordinary royal justice.

[1] 16 Car. I, c. 10.

CHAPTER IX

THE COURTS OF COMMON LAW

As in the reign of Edward I the administration of the common law took the shape which it kept till the Judicature Act of 1873, it will be convenient to briefly sketch the functions and fortunes of the superior courts. Though the establishment of the Common Pleas at Westminster relieved parties from the expense of travelling about after the King's Court, yet they had to come up to Westminster: so by the Statute of Westminster II litigants were permitted to prosecute and defend their suits by an attorney, or as we should say nowadays by a solicitor[1]. The King's Bench could always be directed to accompany the king, and thus we find that while writs in the Common Pleas were made returnable at Westminster, those in the King's Bench were returnable 'before the king himself wherever he should then be in England.' Once the court followed Edward to Scotland and sat at Roxburgh. The Exchequer, for obvious reasons of convenience, very soon sat only at Westminster, and the King's Bench shortly followed the example.

These two courts having become stationary, but having no jurisdiction over purely civil cases, which were the province of the Common Pleas, commenced to poach on this well-stocked preserve,—*boni judicis est ampliare jurisdictionem*, and virtue was suitably rewarded by court fees.

[1] 13 Edw. I, c. 10.

The Exchequer employed the writ of *Quominus*, in which the plaintiff, who desired his case tried in the Exchequer, suggested that he was the king's debtor, and that the defendant had done him an injury, *quominus sufficiens existit* to pay the king his debt. The allegation of a king's debt was a mere fiction, but it was not allowed to be contradicted, and it was held that this circumstance made the action a revenue matter, properly cognizable in the Exchequer. This writ was a *capias*, and on it the defendant could be arrested and brought into the Exchequer. The writ was as follows:—

The Writ of Quominus.

'George II, by the grace of God, of Great Britain, France, and Ireland, King, Defender of the Faith and so forth, to the Sheriff of Berkshire greeting. We command you that you omit not by reason of any liberty of your county, but that you enter the same, and take Charles Long, late of Burford of the county of Oxford, gentleman, wheresoever he shall be found in your bailiwick, and him safely keep so that you may have his body before the barons of our Exchequer at Westminster on the morrow as hereby directed to answer William Burton our debtor of a plea that he render to him £200 which he owes him and unjustly detains, whereby he is the less able to satisfy us the debts which he owes us at our said Exchequer, as he saith he can reasonably show that the same he ought to render: and have you there this writ. Witness, Sir Thomas Parker, Knight, at Westminster, the sixth day of May in the twenty-eighth year of our reign.'

To which the sheriff makes a return: 'By virtue of this writ to me directed I have taken the body of the within named Charles Long, which I have ready before the barons within written, according as within it is commanded me.'

The King's Bench employed the writ of *Latitat*. The Court of King's Bench had an original jurisdiction in trespasses *vi et armis*, committed in Middlesex or wherever the

court happened to sit, such trespasses being considered to be of a criminal nature and to demand a speedy remedy. The plaintiff therefore, who desired to bring a civil action, say for debt, in the King's Bench, took out what was called a bill of Middlesex, alleging in it trespass *vi et armis*. In it, the sheriff was directed to take the defendant and to have him before our lord the king at Westminster to answer. Once the defendant was in the custody of the marshal of the King's Bench he was considered to be before the court for all purposes, and could be proceeded against by bill for debt, which made it unnecessary to take out an original writ as was the proper course on such a cause of action.

In time it was considered enough that the defendant should appear or give bail, actual custody was not required. If the sheriff of Middlesex could find the defendant, well and good and he produced him in court, but the defendant might perhaps be living in Berkshire, but that made no difference, the sheriff made the return *non est inventus*, and then came the writ of *Latitat* addressed to the sheriff of Berkshire where the defendant lived, reciting the bill of Middlesex and the proceedings thereon, and that it is testified that the defendant *latitat et discurrit* in Berkshire, and commanding the sheriff to have his body in court on the day of the return.

Many complaints arose that persons were arrested on these Bills and Latitats which did not express any particular cause of action, and were kept long in prison for want of bail, bonds with sureties having been demanded in such great sums that few dared to be security to such an amount, although there were little or no cause of action. Accordingly the Statute 13 Car. II, st. 2, c. 2, provided that the true cause of action should be expressed in the writ, else the person arrested should be bailed and no security for appearance should be taken in a greater sum than £40. To meet this difficulty the King's Bench added an '*ac etiam*' clause to the usual complaint, thus if the plaintiff wished to sue the defendant

for debt he alleged first of all the fictitious trespass, and then added the *ac etiam* clause in which the debt was mentioned, as though it were subsidiary to the fictitious claim.

The Bill of Middlesex.

'Middlesex to wit:—The sheriff is commanded that he takes Charles Long, late of Burford of the county of Oxford, if he may be found in his bailiwick, and him safely keep so that he may have his body before the lord the king at Westminster on Wednesday next after fifteen days of Easter to answer William Burton, gentleman, of a plea of trespass (*and also* to a bill of the said William against the aforesaid Charles for £200 of debt according to the justice of the said court of the said lord the king before the king himself to be exhibited), and that he have there then this precept.'

The sheriff's return: 'The within named Charles Long is not found within my bailiwick.'

The writ of Latitat.

'George II, by the grace of God the Lord of Britain, France, and Ireland, the King, Defender of the Faith and so forth, to the Sheriff of Berkshire greeting. Whereas we lately commanded our sheriff of Middlesex that he should take Charles Long, late of Burford in the county of Oxfordshire, if he might be found in his bailiwick, and him safely keep so that he might be before us at Westminster, at a certain day now passed, to answer unto William Burton, gentleman, of a plea of trespass (and also to a bill of the said William against the aforesaid Charles for £200 of debt according to the custom of our court before us to be exhibited), and our said sheriff of Middlesex at that day returned to us that the aforesaid Charles was not found in his bailiwick, whereupon on behalf of the aforesaid William in our court before us, it is sufficiently attested that the aforesaid Charles lurks and runs about in your county, therefore we command you that you take him, if he may be found in your bailiwick, and him safely keep so that you may have his body before us at Westminster on Tuesday next after five weeks of Easter, to answer to the aforesaid William of the plea (and

bill) aforesaid, and have you there then this writ. Witness,' &c.

On which there comes the sheriff's return: 'By virtue of this writ to me directed I have taken the body of the within named Charles Long which I have ready at the day and place within contained according as by this writ it is commanded me.'

Thus, these two courts obtained a jurisdiction coextensive with that of the Common Pleas in personal actions.

Uniformity of Process Act.

This state of things lasted till 1832, when the Uniformity of Process Act, 2 Will. IV, c. 39, abolished this variety and multiplicity of process, but recognized and confirmed the co-ordinate jurisdiction.

The King's Bench: its supervisory powers, and methods.

The King's Bench presided over the administration of the criminal law. There was and is no offence not triable there. It superintended the other tribunals, employing the writs of *mandamus*, *prohibition*, *certiorari*, and *error*.

The writs of Mandamus and Prohibition issued, and issue still, when either justice is delayed by an inferior court that has proper cognizance, or such inferior court takes upon itself to examine a cause and decide the merits without legal authority. In the first case a writ of Mandamus is issued. 'This is a prerogative writ flowing from the king himself sitting in the Court of the King's Bench, superintending the police, and preserving the peace of the country[1].' It issued from the King's Bench, and was a command directing any person, corporation, or inferior court of judicature in the king's dominions to do *some particular thing* therein specified appertaining to its office or duty, which the Court of King's Bench supposes to be consonant to right and justice, where the performance of the duty sought to be enforced could not be compelled by action. An order *nisi* issues in order to give the other side an opportunity of showing cause why a mandamus should not issue. There was a similar writ

[1] Per Lord Mansfield, *R.* v. *Barker*, 1 W. Bl. 352.

'procedendo ad judicium' which issued from Chancery for delay in giving judgement returnable in the King's Bench or the Common Pleas. It did not direct any particular judgement to be given, for an erroneous judgement may be set aside on appeal, but *some* judgement must be given without further hesitation. Disobedience is punished by attachment, and committal for contempt.

The writ of Mandamus.

> 'Victoria by the grace of God, &c. to . . of . . greeting. Whereas by . . (recite act of Parliament, &c.) and whereas we have been given to understand, and are informed in the Queen's Bench Division of the High Court of Justice before us that . . (insert averments) and you the said . . were then and there required by . . (insert demands), but that you the said . . well knowing the premises, but not regarding your duty in that behalf, neglected and refused to . . &c., we . . do command you . . firmly enjoining you that you,' &c.

A 'prerogative' writ is one which does not issue like others of strict right, but at the discretion of the sovereign acting through that court in which he is supposed to be present, and only issues from the Queen's Bench Division [1].

The writ of Prohibition.

In the second case the writ of Prohibition is employed. This is a prerogative writ which issued properly out of the King's Bench, but for the furtherance of justice in some cases out of Chancery, Common Pleas or Exchequer, but returnable only in the King's Bench or Common Pleas, now the Queen's Bench Division, directed to the judge and parties of a suit in any inferior Court, commanding them to cease from the prosecution thereof, on the suggestion that either the cause originally or some collateral matter arising therein does not belong to that jurisdiction, but to the cognizance of some other court.

Since the Judicature Acts an appeal lies from every order of the High Court of Justice to the Court of Appeal, and

[1] *Per* Manisty J. *Reg.* v. *Lambourne, &c. Ry. Co.*, 22 Q. B. D. p. 469.

thence to the House of Lords, but till then the only method of questioning the propriety of a prohibition was by the issue of a writ of Consultation under the Statutum de Consultatione 24 Ed. I, for it was held that in such a case a writ of error did not lie either to the Exchequer Chamber[1] or to the House of Lords[2].

If the judge to whom the prohibition went thought it ill founded, he consulted with the king's justices, and if it appeared to the court that it ought not to have issued, a 'consultation' was awarded, signifying to the inferior court that it might lawfully proceed.

'Rex, &c. judicibus ecclesiasticis salutem. Prohibeo vobis ne teneatis placitum in curia christianitatis quod est inter M. et R. de laico foedo predicti R. unde ipse queritur quod M. eum trahit in placitum in curia christianitatis coram vobis, quia placitum illud spectat ad coronam et dignitatem meam.' **The writ of Prohibition to an ecclesiastical court.**

'Dilecto in Christo tali. Inspectis litteris vestris, quas nobis transmisistis et plenius intellectis (sine praejudicio melioris sententiae) consultationi vestrae duximus respondendum, quod si res ita se habet sicut in consultatione vestra exposuistis videtur nobis quod in causa ista bene potestis procedere non obstante regia prohibitione.' **The writ of consultation.**

If the judges did not obey they were summoned to the King's Court to answer.

'Rex vicecomiti salutem. Prohibe judicibus—ne teneant placitum . . . Et summone per bonos summonitores ipsos judices quod sint coram me vel justiis meis ostensuri quare placitum illud tenuerunt,' &c. Glan., Lib. 4, cc. 13–14.

The modern form is as follows:—

'Victoria, by the grace of God, &c. to [*the keepers of Our peace and Our justices assigned to hear and determine*

[1] *Free* v. *Burgoyne*, 5 B. & C. 765.

[2] *Bishop of St. David* v. *Lucy*, 1 Lord Raym. 539.

divers crimes, trespasses, and other offences committed within Our County of . . .] greeting.

Whereas We have been given to understand that you the said [*justices have entered an appeal by A. B. against etc.*]. And that the said . . has no jurisdiction to hear and determine the said . . by reason that [*here state facts showing want of jurisdiction*].

We therefore hereby prohibit you from further proceeding in the said . .'

Witness, &c.

'Thus careful has the law been in compelling the inferior courts to do ample and speedy justice: in preventing them from transgressing their due bounds, and in allowing them the undisturbed cognizance of such causes as by right founded on the usage of the Kingdom or on Act of Parliament do properly belong to their jurisdiction [1].'

Writ of Certiorari. The writ of Certiorari issues to judges or officers of inferior jurisdictions from the King's Bench, now [2] the Queen's Bench Division of the High Court, to certify or send proceedings before them into the Queen's Bench Division, whether for the purpose of examining into the legality of such proceedings, or for giving fuller or more satisfactory effect to them than could be done by the court below. It can also be used for removing indictments found at Quarter Sessions in London, Westminster, Southwark, Middlesex, Essex, Kent, and Surrey, into the Central Criminal Court, and for removing indictments from any Court of Sessions, Assize (including the Central Criminal Court), Oyer and Terminer, Gaol Delivery or any other court into the Queen's Bench Division on the Crown side. The Crown can demand this writ of absolute right, the subject obtains it at the discretion of the court. The grounds on which it is granted are that a fair and impartial trial cannot be had in the court below, that questions of law of unusual difficulty may arise, or that a special jury may be required for a satisfactory trial.

[1] Bl., *Comm.*, iii. 114.

[2] Judicature Act, 1873, § 34.

'Victoria by the grace of God &c. to Our justices of Oyer and Terminer, in and for Our County of Oxford, and to every of them greeting: We being willing for certain reasons that all and singular indictments of whatsoever felonies [*or* misdemeanours] whereof *A. B.* is or may be before you indicted (as is said) be determined before us in the Queen's Bench Division of our High Court of Justice, and not elsewhere, do command you, and every of you, that you or one of you do forthwith send under your seals, or the seal of one of you, before us in Our said Court at the Royal Courts of Justice, London, all and singular the said indictments, with all things touching the same by whatsoever name the said *A. B.* may be called therein, together with this Our Writ, that We may cause further to be done thereon what of right and according to the law and custom of England We shall see fit to be done.' Writ of Certiorari to remove Indictment into Queen's Bench Division from Assizes.

Witness, &c.

The 'writ of error' issued either on the suggestion of some fact which affects the validity of the action, as for instance, that the unsuccessful party was an infant and appeared by attorney, or on some error in point of law, apparent on the face of the proceedings; or in other words, error on the record. Errors in law from the Common Pleas were taken to the King's Bench till 1830. The writ of error.

The Exchequer declined in 11 Ed. III to send their record to the King's Bench on the ground that the Exchequer had always amended its own error with some outside assistance. This position they maintained, but they failed to prove their independence of the Curia Regis. By the 31 Ed. III, st. 1, c. 12, the Lord Chancellor and the Lord Treasurer, associating with themselves Judges and other learned persons, were directed on complaint of error in the Exchequer, to call before them the Barons of the Exchequer with the record, and amend the error, if any. This was the first court of Exchequer Chamber. By the 27 Eliz. c. 8, a second court of judges of the Common The Court of Exchequer Chamber (Cam. Scacc.).

Pleas and of the Exchequer was formed to review certain judgements in the King's Bench, other judgements going direct to the House of Lords; and by the 11 Geo. IV, 1 Will. IV, c. 70, writs of error upon any judgement given by the King's Bench, the Common Pleas, or the Exchequer shall be only returnable in the Court of Exchequer Chamber, before the judges of the other two courts. From that court appeal lay to the House of Lords, which represents the old Curia Regis.

The C. L. P. Act, 1852, abolished the writ of error in actions in the Superior Courts and a memorandum in error was substituted; that again was abolished by the rules under the Judicature Acts (O. 58), and an appeal in the full sense provided instead.

Writ of error in criminal cases.

The writ still exists as part of the Criminal Law[1], but only where some irregularity apparent upon the record of the proceedings takes place in the procedure. It issues from the Crown Office (R. S. C. 31 Jan. 1889) on the fiat of the Attorney-General, and is directed to the judge of the inferior court, requiring him to send the record and proceedings of the indictment, inquisition, or information, on which judgement has been pronounced, and in which error is alleged, to be 'inspected, viewed, and examined,' to the court authorized to review the same. That court may examine the record, and affirm or reverse the judgement according to law. The judgement must be on an indictment and given in a Court of Record.

The Courts of Assize and Nisi Prius.

At the present day the judge who comes on circuit to Oxford sits under three commissions: (1) the commission of General Gaol Delivery, in virtue of which he clears the gaol of all persons awaiting trial; (2) of Oyer and Terminer, in virtue of which he tries those criminal cases in which the grand jury have found a true bill; (3) the commission of Assize, which

[1] For the history of the writ of error in criminal cases, see Lord Mansfield's judgement in *Wilkes' case* (4 Burr. 2550).

is a survival of the old commission empowering the judge to take the verdict of that special sort of jury called an Assize, summoned for the trial of certain issues (*vide supra*), to which, by Stat. West. 2, c. 30, is annexed the commission of *Nisi Prius*. Before the *Nisi Prius* writ was invented, if the plaintiff had an action in Oxfordshire, he had to come up to London to try it, and bring his witnesses, the sheriff of the county being directed by a writ of *venire facias* to bring up an Oxfordshire jury; when the Statute empowered the judges of Assize to try other issues in the counties, the writ was altered, and the sheriff was directed to bring up the twelve lawful men from Oxford to try the Oxfordshire case in London, unless before the date specified, the justices of the king had come into that county, 'nisi prius ad partes illas venerint,' in which case the justices tried the cause in Oxford, and spared everybody the trouble of coming to London. The amended form of the writ was: 'Praecipimus tibi quod venire facias coram justiciariis nostris apud Westmonasteriam in Octabis Sancti Michaelis, nisi talis et talis tali die et loco ad partes illas venerint, duodecim legales homines &c.[1]' in which case it was his duty to return the jury, before the judge of Assize. By the 27 Ed. I, c. 3, the justices of Assize are to be commissioners of gaol delivery. By the 2 Ed. III, c. 2, they shall be made commissioners of oyer and terminer. Since the Judicature Act of 1873 the judge acting under these commissions is 'a court of the High Court of Justice[2],' which means that he is not limited by the terms of his commissions, but that he can do anything that a judge sitting in the Royal Courts of Justice can do. Before the Act a mandamus could issue to him if he refused to perform an obligatory duty[3].

[1] 13 Ed. I, c. 30, § 1.

[2] 36 & 37 Vict., c. 66, § 29.

[3] *R.* v. *Harland*, 8 A. & E. 826. See, however, the judgement of Willes J. in *Ex parte Fernandez*, 10 C. B. N. S. at p. 49.

CHAPTER X

THE HIGH COURT OF PARLIAMENT, THE HOUSE OF LORDS, AND THE COURT OF THE LORD HIGH STEWARD.

The High Court of Parliament.

WE have already seen [1] that in the reign of Edward I a court is being evolved which may be considered as higher than the King's Bench or as an 'afforced' form of the King's Bench. But it is presently recognized as distinct, 'habet Rex curiam suam in consilio suo in parliamentis suis . . . ubi terminatae sunt dubitationes judiciorum.' The Curia Regis, of which Parliament is the representative, being always a court of final resort, as well as in some cases a court of first instance, this is a restatement of an accepted constitutional position. The King in Council in Parliament supervised the inferior courts.

Common law appeals.

The system of appeal was as follows. Error in the Common Pleas went to the King's Bench. The judgements of the Chancellor in his capacity as a Common Law judge could be examined and reversed on a writ of error in the King's Bench, the last instance occurring in the fourteenth year of Elizabeth [2]. The Exchequer maintained its independence of the King's Bench, but by statute was directed to produce its record before a Committee of the King's Council [3].

[1] Vide sup., p. 61. [2] Dyer, 315, No. 100. [3] Vide sup., p. 71.

By 14 Ed. III, st. 1, c. 5, a Committee of Council is empowered on complaint of delay to summon any justices and make a judgement; special difficulties to be kept for the next Parliament.

The jurisdiction of the House of Lords, on appeals at Common Law

When the Council split off from Parliament in the reign of Richard II, the jurisdiction remained in the House of Lords. The question had been considered, for in Rot. Par. 50 Ed. III, no. 48, the unanimous opinion of the judges as to Common Law appeals is entered, that when error occurred in the King's Bench it should be amended *in Parliament*—by the King in Council in Parliament. The argument was that the Council was excluded for Council was not Parliament, and the Commons were excluded for they were not Council. This view the Commons accepted in the first year of Henry IV.

and Chancery.

The Lords' jurisdiction in Chancery appeals was of slow growth, for equitable jurisdiction itself grew slowly. No instance is known before 1621 when the Lords heard *Sir John Bourchier's* case, and a Committee of Privileges considered that the course then taken was unusual if not incorrect.

In 1640 Lady Moulson's petition for the reversal of a decree was referred to the Committee of Petitions.

In 1675 this appellate jurisdiction was disputed by the Commons but without success, and since then has not been questioned.

As a court of first instance.

When the Council separated from Parliament, and the Chancellor and the Common Law Courts were in full work, there was little room for the House of Lords to act as a court of first instance.

In 1668 occurred the case of *Skinner* v. *the East India Company*. The plaintiff petitioned the King alleging that as the injury had been committed in India, he could get redress in no other court. The Lords undertook the trial and gave judgement for the plaintiff. The Company then petitioned the Commons and a violent dispute was the result, which was

only composed by the King acting as mediator and all records of the proceedings were erased from the journals of both Houses. Since then the Lords have never acted as a court of first instance in civil cases.

In criminal cases.

The criminal jurisdiction of Parliament may probably be now considered of only historical interest. Should it, however, be again invoked, it inheres in and is exercised by the House of Lords.

That jurisdiction may be exercised on two occasions. A Peer has the privilege if indicted for treason or felony to be tried by his peers: and the House of Commons has the right to impeach any person for any offence, before the House of Lords sitting as judges.

The Peer's Privilege.

Its origin

This privilege if it rest on any written authority rests on the clause of Magna Charta in which occurs the famous phrase *judicium parium.* These words do not mean 'trial by jury,' for at that time trial by jury was unknown. They were used with reference to those cases in which the rights of landholders over their land or to feudal services, were in dispute, and meant that the proper tribunal for determining such cases was the *pares curiae.* A suit, for example, in which a tenant *in capite* was defendant should properly come before a court composed of other tenants *in capite.* It is possible that we find here a note of resentment that the causes of great men should be tried before the new-fangled royal justices who were, barring their wits, nobodies; but the meaning is fairly obvious, for in c. 21 of the charter, it is expressly provided that no amercements in court are to be enforced against Earls or Barons except by their peers.

The *judicium parium* had no direct reference to the administration of criminal justice; but as a conviction for treason or felony involved the consequences of forfeiture and escheat, it was very natural to desire that charges at any rate

of treason and felony should be tried by Peers, and in fact no further claim was ever seriously made.

In 1341 a Committee of Peers and Sages of the Law was appointed to examine in what cases Peers should be bound to answer in Parliament and in what cases not. It reported, the Sages of the Law not assenting, that in *all* cases, not merely treason or felony, where the King was a party, they must answer in Parliament. An Act was passed accordingly but was shortly afterwards repealed, with the result that the clause in Magna Charta remains the sole written authority for the privilege, and the more extended view of the privilege has been allowed to drop. **and extent.**

If Parliament is sitting the tribunal is the House of Lords presided over by the Lord High Steward who is appointed under the Great Seal *ad hoc*, and the Peers are the judges. If Parliament is not sitting the court is the Court of the Lord High Steward, he being appointed in the same manner. **The House of Lords and**

The Court of the Lord High Steward dates from the first year of the reign of Henry IV. The Earl of Huntingdon in that year was tried before it on an indictment for treason found before the Mayor and Justices of London, Parliament not being in session. He was found guilty and sentenced to be hanged and disembowelled alive, but oddly enough it is uncertain what really happened to him, for next year there is a declaration in Parliament by the Lords Temporal that there should be a forfeiture of his lands, notwithstanding that he had been *beheaded by the King's lieges without due process of law.* **the Court of the Lord High Steward,**

Littleton, as Mr. Pike[1] points out, hardly recognizes this Court as existing apart from Parliament, probably because the Lord High Steward was the proper President of a trial in the House of Lords.

But in the reign of Henry VII the Court was fully

[1] *Const. Hist. of the House of Lords.*

recognized as the Court which sat when Parliament was not in session.

how differing.

A curious fact is that whereas if Parliament was sitting all Peers could attend as judges, if Parliament was not sitting the Lord High Steward could form his Court by summoning only those Peers whose presence he desired. In the trial of the Earl of Warwick in the reign of Henry VII only twenty-two Peers were present; in the next reign the Duke of Buckingham was tried before nineteen. The presiding judge could thus pack the court, down to the reign of William III.

The privilege was, as has been said, of feudal origin. When the feudal doctrine broke down, as the feudal tenures disappeared, a new doctrine of nobility by blood took its place. The privilege was referred to nobility of blood rather than to the possession of a seat in the House of Lords, and it was enjoyed by Lords under age and by the Popish Lords who were incapable of sitting there.

Recognition by statute.

All statutes dealing with treason and felony saved this privilege of the Peerage[1], and the Court of the Lord High Steward remained unchanged.

Partial assimilation of the two Courts.

By 7 Will. III, c. 3, the jurisdiction in cases of *treason* was conferred on the whole body of the Peers entitled to sit and vote *whether Parliament was in session or not*. This was not, however, to apply to impeachments, to trials for counterfeiting the coin, the Seals, the Sign Manual, or the Privy Signet. The privilege has been extended in some particulars and confirmed by more recent statutes[2]. It is the statutory duty of the Lord High Steward to summon all Peers who are entitled to sit and vote twenty days before the trial. He is the sole judge and decides all matters of law; the Peers attending act as a jury and are called the Lords Triers. The verdict is that of the majority, and to procure a con-

[1] 33 Hen. VIII, c. 12; 35 Hen. VIII, c. 2; 1 Eliz. c. 1; 13 Car. II, st. 1, c. 1.

[2] 2 & 3 Anne, c. 20; 6 Anne, c. 23; 6 Geo. IV, c. 66; 25 & 26 Vict. c. 65.

viction there must be twelve who find the accused guilty. The proceedings are on indictment found in the ordinary course and removed by *certiorari*.

If we make an exception in favour of the treasons to which the statute of William applies, it seems that if Parliament were not in session, a Peer could be tried by the Court of the Lord High Steward made up of a limited number of Peers.

If Parliament is sitting, any Peer including those of Scotland and Ireland, has a right when indicted of high treason, felony, or misprision, to be tried by Peers in the House of Lords: if Parliament is not sitting, in the Court of the Lord High Steward. In the first event the spiritual Lords can attend up to judgement, but they have never been summoned to the Court of the Lord High Steward. The reasons are historical.

The position of the spiritual Lords, and its explanation.

The clergy always contended that they were not amenable to the ordinary courts of law, and that they were only bound to answer in their own ecclesiastical tribunals, and they for a long time made their contention good, although it is doubtful whether high treason was ever covered by 'benefit of clergy': it certainly was not at a later date[1]. Consistently with this view a Bishop if arraigned for treason never pleaded his peerage but pleaded his clergy. The churchman claimed entire exemption from all secular jurisdiction whatever, and nothing less.

The Bishop of Hereford, in the seventeenth year of Edward II, when arraigned in the King's Bench for treason, pleaded his 'clergy,' which was allowed by Parliament on the point being referred.

The Bishop of Carlisle, who was implicated in the Earl of Huntingdon's treason, was indicted in the King's Bench; he pleaded under protest of his ecclesiastical privileges, and put himself on the jury and was convicted: but never pleaded his peerage.

[1] 2 Inst. 634.

The Bishops had struggled to get rid of secular jurisdiction and with this result. They had always rejected the right, which, perhaps as holders in barony they may have had, of being tried by Peers on an indictment. As the Church could not consent to a judgement of blood, they were useless as judges in cases of treason and felony. When the Court of the Lord High Steward was instituted, the claims of the spiritual Lords to be Peers of the Realm was practically extinguished. They never received a summons from the Lord High Steward for they could not pass sentence. In trials in the House of Lords they were occasionally represented by a lay Peer as their proxy, which Littleton considered right and proper, but whatever the difficulty was, no Proctor was ever nominated for the Court of the Lord High Steward.

In the reign of Henry VII they are known as 'Lords of Parliament' and not as 'Peers of the Realm,' and when the monasteries were dissolved and the Abbots disappeared, only a beggarly remnant of Bishops survived, without numbers and without influence.

Cranmer when indicted put himself on a jury of Middlesex, then withdrew his plea and pleaded guilty and never raised the question. Since that trial it has never been suggested that Bishops enjoy a trial by Peers of the Realm.

When the feudal tenures went, with them went the only chance the Bishops had of recovering what they had so long disdained. It is possible that if advanced in time a claim resting on their tenure in barony might have been sustained. But when the feudal tenures were abolished it was too late: the temporal Peers retained their privileges merely because the Act which put an end to the tenures saved the benefit.

The Commons' Right of Impeachment.

Criminal proceedings by way of impeachment were taken in the High Court of Parliament before the Lords as judges,

the Commons being then prosecutors, and appearing by managers appointed for the occasion, who exhibit articles of impeachment. The Lords vote individually and the majority prevails.

Before the reign of Henry IV the practice when a peer was accused was extremely irregular and unsettled. Bracton apparently only knows of 'appeal' as the method of accusation in such a case. Gaveston was not tried at all, but beheaded by four earls acting under an Article of the Lords Ordainers which provided that he should be treated as a public enemy if he returned from banishment. The Earl of Carlisle, in the same reign, was degraded from his peerage by a Commission on the ground that his misdeeds were notorious and 'our Lord the King records the fact,' and then sentenced.

Procedure irregular.

In 1304 Nicholas de Segrave was accused in Parliament by the King and pleaded 'guilty,' and the King then consulted the Comites, Barones, Magnates, and others of the Council as to the punishment, but in the end pardoned him [1].

In the reign of Edward III procedure is still uncertain. In the fourth year of the King, the Peers, at the special request of the King, heard the case of Simon de Bereford accused of treason, and gave judgement, but protested that they were not bound to try *other persons than peers* [2].

In the same year, Sir Thomas Berkeley, being brought before the King 'in full Parliament' and charged with the murder of Edward II, said that he was then lying ill in another place and put himself 'de bono et malo super patriam.' And the jury came 'coram domino rege in parliamento suo' and found in favour of the 'alibi': 'ideo idem Thomas inde quietus' (1330 A. D.) [3].

A jury in parliament.

In 1376 (50 Ed. III) the case of Lords Latimer and Neville and certain commoners occurred, and is frequently referred to as the first instance of a genuine impeachment in

[1] 1 Rot. Parl. 172. [2] 2 Rot. Parl. 53. [3] Ibid., 57.

our sense. The Commons petitioned that the articles of impeachment should be heard by a commission of judges and other lords in London and other suitable towns, to which the King assented[1].

The Lords no longer object to try commoners.

In 1387 we find that the Lords have abandoned the view that they are not bound to try commoners, for in an appeal of treason against the Archbishop of York and certain peers and commoners they claimed the right to judge peers *with others* in crimes against the State, and did so. This is worthy of attention, as showing that the doctrine that commoners could be impeached only for misdemeanours had not yet appeared.

Ten years later (1397) the Commons claimed the right to impeach any person when they pleased in Parliament, and recorded their claim on the Parliament roll. The King assented, and on the same day they impeached the Archbishop of Canterbury. The King took time to consider, on the ground that *the Archbishop was a peer of the realm.* The Archbishop made a confession which was adjudged in Parliament by the King, the Temporal Lords, and Thomas de Percy *as proctor for the prelates and clergy*[2] to be a confession of treason. Sentence of banishment accordingly.

Appeals in Parliament

In Richard II's reign it was quite common for private persons not members of Parliament to bring criminal accusations in Parliament on which proceedings were taken[3], and the practice culminated in a series of appeals and counter appeals brought by the ministers of Richard II against each other in Parliament for high treason as each party got the upper hand. In consequence, the Stat. 1 Henry IV, c. 14 was passed which provided that henceforth no appeal should

abolished.

[1] 2 Rot. Parl. 323-326, 329, 385.

[2] This procuration or proxy was resorted to in consequence of the Commons complaining that judgements and ordinances had been in the past annulled on the ground that the clergy had not on the particular occasion been represented.

[3] Steph. H. C. L. i. 151 sq.

be pursued in Parliament; the only process which was left for the judgement of a peer by peers is either by impeachment or indictment, and that rule remains in force at the present day.

The statute, however, placed no obstacle in the way of a commoner 'appealing' a peer. In such a case the appellee was not tried by his peers but like any common person [1]. If battle was waged in the appeal, it was a matter of the greatest public interest, and the King provided weapons, tents, and all the paraphernalia of a fight, and money for the combatants to get whatever was requisite. In the 25th year of Henry VI the Prior of Kilmaine appealed the Earl of Ormonde of treason: the field of battle was prepared, but the King at the instance of 'certain preachers and doctors,' took the quarrel into his own hands. But all preparations had been made. In the Proceedings and Ordinances of the Privy Council we have the King's letter to Ormonde permitting him to go for a time and stay near Smithfield 'for your breathing and more ease,' and Philip Treher, fishmonger of London, who had by the King's command been giving the Prior a few lessons in 'certain points of armis' was given £20 by his Majesty [2] for his pains.

Things did not always fall out so smoothly. In the same year John Davy an armourer's apprentice appealed his master William Catur of treason, and battle was agreed and a day settled by the Constable and Earl Marshall. We have the King's writ under the Privy Seal to the Serjeant of the Armoury to properly arm the Appellant, and another letter from the King to Philip Treher bidding him be 'intendaunt and of counsaill' to the said appellant. Seconds were also appointed for the appellee [3]. The battle took place at Smithfield. 'The master being well beloved was so cherished by his friends and plied so with wine that being therewith

[1] Y. B. Easter, 1 Ed. IV, no. 17, fo. 6.

[2] Nicholas, vi. 129 140.

[3] Ibid., 55-59.

overcome was also unluckily slain by his servant: but that false servant (for he falsely accused his master) lived not long unpunished, for he was after hanged at Tyburn for felony[1].'

Impeachments of commoners.

With respect to impeachments against commoners it has been pointed out that the Lords at an earlier period did not always hold the same view, and Blackstone[2] laid it down that a commoner can be impeached only of a misdemeanour. This position, which cannot be maintained now, is possibly, as Mr. Pike suggests, due to the fact that between 1449 and 1621 there were no impeachments at all, proceedings being taken by a Bill of Attainder, which was usually introduced in the Lords, and this perhaps may have obscured the right of the Commons to impeach a commoner.

In *Fitz-Harris's case*[3] the impeachment was for high treason. The Lords refused to try him and voted that the proceedings should be at common law. The Commons thereupon resolved that it was their undoubted right to impeach any peer or commoner for treason or any other crime or misdemeanour. Parliament was speedily dissolved and Fitz-Harris was tried and convicted by a jury. This case was perhaps prejudiced by the fact that the Lords knew that Fitz-Harris had already been arrested and was waiting his trial in the ordinary course, and that if a bill had not been already found against him it speedily would be.

In 1689, in the case of Sir Adam Blair and four other commoners impeached for high treason, the Lords searched for precedents and resolved that the impeachment should proceed.

Law as to impeachments generally.

It remains to say that it was settled in *Lord Danby's case* (1678) that a pardon by the Crown could not be pleaded in bar to an impeachment, a rule made statutory by the Act of Settlement, and that the Bishops, though they could in a capital case be present and vote on all preliminary questions,

[1] *Stow's Chron.*, by Howes, p. 385.

[2] *Comm.*, iv. 256.

[3] 8 S. T. 236.

should not vote on the final question of guilty or not guilty. By ancient custom the Bishops never voted on a judgement of blood and they were expressly excused by the Constitutions of Clarendon.

> 'Episcopi sicut caeteri barones debent interesse judiciis cum baronibus quousque perveniatur ad diminutionem membrorum vel ad mortem.'

It is almost certain that neither prorogation nor dissolution stops an impeachment. The doubts which were felt, produced, on the occasion of the trials of Warren Hastings and Lord Melville, special Acts of Parliament to that effect [1].

Bills of Attainder and of Pains and Penalties.

Although they cannot be considered as truly judicial proceedings, it is perhaps convenient to allude here to the Bill of Attainder and the Bill of Pains and Penalties. These are nothing more than, when passed, Acts of Parliament for killing or otherwise punishing a man without trial. The great advantage of proceeding by Bill of Attainder was that thus it was possible to get rid of the difficulty, sometimes as in Strafford's case insuperable, of proving that the person whose death was desired had committed any offence known to the law which would support the capital charge.

[1] 26 Geo. III, c. 96, and 45 Geo. III, c. 125.

CHAPTER XI

THE KING'S COUNCIL

The Council exercises residuary justice, criminal and civil, through

IT is only with the judicial functions of this great Court that we are now concerned, and of these some account must be given, and it may be convenient to say that the view which will be presented in the following pages is that up to the time of the Tudor monarchs, what is so familiar to students of Sir H. Maine's works as 'the residuary royal justice,' both civil and criminal, was administered by the Council or the King in Council, and that although a line of cleavage is becoming visible, yet that no actual and permanent cleft occurred between the civil and criminal work till the time of the Tudors, when the criminal side became the province of that committee of the Council which is known to us as the Court of Star Chamber, and the civil side partly became the peculiar and separate jurisdiction of the Chancellor and partly was exercised by the Court of Requests. The generally accepted view is that the cleft occurred much earlier, perhaps as early as the reign of Richard II. It does not seem to me that this view is borne out by the evidence that we have, but this is a matter of opinion, and every one must judge for himself.

(1) the Star Chamber, (2) the Chancellor, (3) the Court of Requests.

To judge from the records, the early Norman kings were in matters of law and justice almost absolute. The king's will was law, and his will was testified in affairs of state or justice by parole or writing. It was not necessary that writing or a *writ* should be used, but it was inevitable

that this use should become universal, for thereby the royal message could arrive precise and ungarbled at the most distant part of the country. The authenticity of the message was certified by the Royal Seal which was difficult to imitate.

The Chancellor's duties at first secretarial.

The Chancellor kept the seal, and with his clerks discharged the manual labour of writing the writs out and sealing them. The writs were sealed on the marble table at the end of Westminster Hall. The Chancellor, being a domestic chaplain, lodged in the king's house; his clerks lived together at a *hospitium* near at hand in Westminster, and when the king travelled, they all went with him, and a *hospitium* was set apart for them at every town where they stopped, and the records were carried on the back of a strong horse, which it was the duty of some religious house to provide.

> 'Memorandum quod decimo octavo die mensis Januarii quadraginta solidi (i.e. 40*s*.) quos abbas de Kingeswode liberavit in cancellaria in subvencionem cujusdem equi emendi ad portandum rotulos cancellariae' (Rot. Claus. 20 Ed. I, m. 11 d.).

But the Kings were not quite absolute. Even Kings are not omniscient, and feudal monarchs were entitled to the counsel and advice of their vassals. The immediate *entourage* of the King consisted of those men on whose sagacity and valour he habitually depended. These form the King's Council. Under such circumstances the right to demand advice in difficulties becomes in time barely distinguishable from the obligation to accept or at any rate to ask for it.

The administration of justice is not only a matter of difficulty, but one in which all are interested, and as a fact we find the Council consulted, informally no doubt, but consulted in some affairs which the King did not desire to decide by himself[1].

[1] *Abbot Gausfrid* v. *Abbot of Marmoutier*, Pl. Ang.-Nor., p. 122; *The Case of Hugh Bigot's widow*, ib. 230.

The writs originally came from the King in Council, and ran in any franchise, in Chester, Manchester, Wales, Ireland, Poitou and Gascony.

A writ could be registered, and the clerk of the Chancellor kept records, which were used for reference, and supplied precedents. When a complainant came with some common tale of injury which the clerks had heard before, all that was needed was to turn up the record, and copy out the precedent, of the remedial writ. Such a writ was, what lawyers now would call 'common form,' and what our ancestors called *de cursu*. We know that there was a considerable list of these writs, for in the twelfth year of Henry III, Letters Patent went to Ireland giving the forms of fifty-one writs *de cursu* then in force, which were in Ireland to go henceforth under the seal of the Justiciar[1].

But if a complainant came with a grievance for which there was no appropriate writ, it was not the clerks' business to invent a writ, it was their duty to consult their betters.

His activity.

It is plain from the Provisions of Oxford (1258) that the Chancellor, whose duties were secretarial, had been taking on himself the task of framing new writs, and that the Council had observed this activity with disfavour. And naturally, for they recognized that the man who can make a legal writ, can make a legal right.

Accordingly in the Provisions the following clauses occur: 'The Chancellor of England swore this—

That he will seal no writ, excepting writs of course, without the commandment of the King and of his Council who shall be present.'

'Of the Chancellor—

That he at the end of the year answer concerning his time. And that he seal nothing out of course by the sole will of the King. But that he do it by the Council which shall be around the King[2].'

[1] Palgrave, *The King's Council*, p. 16. [2] Stubbs, *Sel. Ch.*, pp. 393, 395.

From this it is permissible to draw two conclusions, first, that the Chancellor had, either on his own authority or with that of the King, been sealing novel writs; secondly, that the Council was determined to assert or maintain its supremacy over the *officina justitiae*, and to make it plain that the royal authority was insufficient without Council authority. Council authority asserted.

The Provisions of Oxford lived only six years, but that short period seems to have been enough to check permanently any development in the English common law. By statute the clerks in Chancery were encouraged to issue writs 'in consimili casu,' when 'in uno casu reperitur breve, et in consimili casu cadente sub eodem jure et simili indigente remedio non reperitur,' the clerks are to agree in making a new one or adjourn the question to Parliament. But it seems agreed that the results were not such as might have been expected if full advantage had been taken of the Act. It was after all left for the Chancellor to take notice of those wrongs for which the stiffness and obstinacy of the common lawyers refused a remedy. Unexpected result.

Before the reign of Edward I, from absence of records, the history of the King in Council is obscure: and even in Edward's reign the line between Council, Parliament, and Curia Regis is uncertain. Council and Parliament.

Parliament was summoned, not merely for legislation or taxation, but to discuss and hear all sorts of complaints. It was the extraordinary court of Royal Justice. The hearing of petitions.

If the common law was inefficacious, if the party professed inability to sue, or said that he could not get a fair trial by jury or ordinary process, he petitioned Parliament, and we find all these allegations in petitions.

Most petitions referred to king's debts, or royal charters, or to cases where royal rights were concerned, escheats and forfeitures, or where Ministers were alleged to be withholding rights which properly belonged to the subject.

The Council in Parliament seems to have delivered solemn

judgements, but until a comparatively late period the Chancellor never exercised judicial functions *unless by authority of the Council*, and if acting ministerially he had the assistance of his staff.

When complaint was made by petition of a private wrong, where the ordinary methods were not speedy or effectual enough, or in cases of extraordinary outrage, the Council either summoned the parties before it, or issued a special commission of oyer and terminer.

Special Commissions

These commissions were of grace and favour, and could issue from the King in person: but as a fact, frequently and usually, the petition was presented to King and Council, or to the Council, in or out of Parliament. Allegations are made of petitioner's poverty, of the power of his enemies, and of the inefficiency of the common law, and the offenders are usually found amongst the baronage, who are accused of gross outrages, assault and battery.

The answers are various: complainant must betake himself to the ordinary course of law, or wait for the circuit of the justices, or he may have a commission if he pays for it.

not popular.

This irregular issue of special commissions was regarded with great suspicion and disfavour, on the ground that it opened the door to abuse and oppression, and in consequence it was provided by Stat. of West. 2, 13 Ed. I, that,

> 'A writ of trespass ad audiendum et terminandum shall not be granted before any justices except justices of either bench and justices in eyre, unless it be for a heinous trespass, where it is necessary to provide speedy remedy.'

In Rot. Parl. 8 Ed. II, No. 8, vol. i, p. 290, we find that the Commons allege that these commissions are being granted too lightly and frequently.

So in 2 Ed. III, at the Parliament at Northampton, the same complaint is made.

During Edward III's reign statutes were passed restraining

unnecessary applications to the King in Council, culminating in 42 Ed. III, c. 3, that no man be put to answer before justices without presentment or matter of record, or by due process and writ original according to the old law of the land, anything to the contrary to be void.

In 7 Ric. II, the complaint is repeated with the addition that pursuers are not made to swear to the truth of their allegations.

Apparently, in the reign of Henry III, the Council was considered a court of peers within the meaning of Magna Charta, for the ascertainment of the rights of tenants in capite or by barony: it also had original jurisdiction, temp. Edward I and Edward II, in cases concerning the King. In the time of the auditors of petitions, if a remainder was in the King, actions brought against the tenant were often stayed by the judges till the Council granted a writ *de procedendo*. But even then the judges were often restrained from giving judgement *rege inconsulto*. Council jurisdiction grows,

> 'Eit bref a les justiz q'ils aillent avant en teu plee nient contre esteant la dite allegeaunce; issi q'ils ne aillent mie a juggement sanz conseiller le Roi.' Palg., p. 125.

So the Council was the proper tribunal for trying many of the king's ecclesiastical rights. Thus a suit in the King's Bench relating to the king's free chapel of Boseham is stayed that it may come before Council:—

> 'Nos ob certas causas coram nobis et consilio nostro propositas volentes dictum negotium coram nobis et dicto consilio nostro et non per alium processum &c. terminari, Vobis mandamus quod processui &c. ulterius faciendo omnino supersedeatis' (Cl. 29, Ed. III, m. 11).

In ordinary cases defendants were brought in on a writ of *scire facias*. This civil jurisdiction was jealously watched and often petitioned against, but without much success.

The Council claimed prerogative jurisdiction in cases of but is always

alleged to be strictly subsidiary.

fraud, deceit and dishonesty, which was not so tangible as to give rise to a prosecution at common law.

Writ 'ne exeat regno.'

Thus writs *ne exeat regno* went against fraudulent foreign debtors who were making off and leaving their debts behind.

But still, with all these complaints, we find that in 27 Ed. III, the first statute of praemunire was passed providing that if an appeal be made to the papal court, the penalty of imprisonment during king's pleasure, forfeiture of lands, goods, and chattels, was incurred by such appellants as did not appear before the King and his Council or in his chancery, or before the justices of either Bench, to answer, &c. From which we are at liberty to infer that the Commons feared the Pope more than the Council.

Council procedure.

The modes that the Council adopted of enforcing appearance were not uniform, but it employed:—

(1) Commissions of oyer and terminer, and arrest after verdict of jury.

(2) 'Praemunire' writs upon suggestions filed before Council:—

> 'Edwardus, &c., vicecomitibus London salutem. Quibusdam certis de causis vobis mandamus firmiter injungentes quod praemunire faciatis H. C. (& ors) quod quilibet eorum sub poena centum librarum in propria persona sua sit coram consilio nostro apud W. hac instanti die Martis ad loquendum cum eodem consilio super iis quae eis tunc ibidem exponentur ex parte nostra et ad faciendum ulterius et recipiendum quod per dictum consilium ordinari contigerit in praemissis. Et hoc sub incumbenti periculo nullatenus omittatis. Et habeatis ibi nomina illorum per quos eos praemunire feceritis et hoc breve. Teste meipso, &c.'

(3) 'The writ of Subpoena.' Waltham could hardly have invented it as some say, for he was M. R., 5 Ric. II, and the first subpoena is found in Rot. Pat. 38 Ed. III, pt. 1, m. 15:—

'Edwardus, &c., dilecto sibi Ricardo Spynk de Norwyco salutem. Quibusdam certis de causis tibi praecipimus firmiter injungentes quod sis coram consilio nostro apud Westmonasterium . . . ad respondendum super hiis que tibi objicientur ex parte nostra, et ad faciendum et recipiendum quod curia nostra consideraverit in hac parte. Et hoc sub poena centum librarum nullatenus omittas. Teste me ipso apud W.'

The complaints continued, and in 2 Ric. II the Council answer by saying that, where the common law cannot have its due course, the Council may send for a man and put him to answer for his misprision, and also *compel him to give surety by oath, or in other manner as seems best for his good behaviour,* and not to disturb the common law. The Council's power of holding to bail.

Here we find an allusion to a very important point of council authority, for when the law of frankpledge became obsolete the justices of the peace acquired by their commission a power to hold persons to bail for the preserving of popular tranquillity: or a party apprehending injury could sue out a writ commanding sheriff or justices to take bail, and the names of the manucaptors were thereon returned into Chancery.

Then by a slight change, the party gave bail in Chancery in the first instance. The last step was that people called before the Council for misdemeanours, &c., were required to give bail either there or before the Council in Chancery.

This power of holding to bail was a very powerful weapon. Thus all the inhabitants of Bury entered into their individual recognizances in £10,000 not to assemble in any illegal meetings, nor commit any offence adjudged to be 'horrible' by the Council, the justices, or the law of the land.

By 17 Rich. II, c. 6, the Chancellor (in assent to a Commons petition) is to give damages according to his direction against a complainant who has come before the Council and has made an untrue suggestion, which was quite a novelty.

Then come more petitions and the answer is always the same. 'Yes: except in cases where one is poor, and other is so rich that no remedy can be had.'

Baronial jealousy.

Meantime in 5 Ed. II a new tribunal was erected by the Provisions of the Lords Ordainers. One bishop, two earls, two barons, are to be assigned in every Parliament to hear and determine complaints against the king's ministers.

This took much of the Council's jurisdiction away, the royal prerogative went to the baronage: a baronial or parliamentary committee took the place of a Council selected by the king. These 'auditors' had the authority of the Council, though occasional reference was made to the Council itself.

Parliamentary activity.

In Edward III's reign the movement proceeds; the administration of justice is held to be a matter peculiarly suitable for Parliament, as opposed to Council, for they are now becoming two distinct bodies. So far does it go that the Commons attempt to participate in exercise of remedial justice; but this was not persisted in, for in 1 Hen. IV they protested that they had no concern with the judgements of the House of Lords (Rot. Parl. 1 Hen. IV, No. 79). But the power of the Lords in Parliament steadily increased at the expense of the Council, and the legal functionaries not being lords become merely assistants and advisers of the peers, liable to give their opinions when called on.

The King in Council in Parliament.

It is significant of the attitude of Parliament that in the fourteenth year of Edward III a statute was passed dealing with the delays arising from judges differing and sending up for advice when Parliament is not sitting. A permanent commission of Parliament is made to hear and make a judgement, and send it down. At the meeting of every Parliament a prelate, two earls, and two barons are to be chosen, who with the advice of Chancellor, Treasurer, Justices of the two Benches, and others of the King's Council shall direct the justices upon petition to them. Exceptional difficulties to be

reserved till the next Parliament. This represents the King in Council in Parliament.

Under the two first Lancastrian kings we see signs of activity in the Commons; they had got hold of impeachment as their special weapon in 1376 [1] and in 4 Hen. IV the writ of subpoena is made to issue by authority of Parliament, upon the petition of John Attewood and Alice his wife to the Lords and Commons in Parliament [2].

Origin of private Acts of Parliament.

In Henry V's reign the Commons take notice of petitions of private individuals to Lords or Council which often were granted in the form of statutes with the express assent of the whole legislature. Hence arose private Acts of Parliament (see Hallam, iii. 92).

Another curious feature that we find, was a writ addressed to the sheriff of a county, by and with consent of the Commons, commanding him to make proclamations that the party should come sometimes before the King's Council to answer such matters as should be alleged against him (Rot. Parl. 4 Hen. V, No. 15, vol. iv, p. 99), sometimes to come before the King's Bench (Rot. Parl. vol. iv, pp. 164–5).

Meanwhile the Council never loosed the reins, but gradually set its affairs in order.

Separation of Council and Parliament.

Under Richard II we may say that the Council definitely separated from Parliament.

Petitions now went into three classes:

1. Bills of Grace answered by King in person.
2. Bills of Council answered by Council.
3. Bills of Parliament answered only with assent of Parliament.

We know now that in 13 Ric. II the Lords of Council met between 8 and 9, business of the King and realm to be dispatched first, common law matters to go to the judges, &c.,

[1] Impeachment of Lords Latimer and Neville and four commoners.

[2] See Palgrave, *The King's Council*, p. 71, for the petition with the writ at the end of it.

and the bills of the *lesser* people ('du poeple du meindre charge') are to be examined and dispatched before the Keeper of the Privy Seal and such of the Council as should be then present[1]. This it is plausibly suggested is the origin of the claim of authority of Privy Seal in the Court of Requests, to which bills went either because the plaintiff was very poor or the king's servant.

During the civil commotions which prevailed in England during and after the reign of Richard II the Council gained ground, and probably the long absence of Henry V from England helped them.

The Council seized by the Baronage.

But on Henry's death, and Henry VI being a minor, the baronage seized the government, the Commons, by a great disenfranchising statute, became their nominees, and a Council was nominated by the Lords during the minority mainly from themselves.

The Lords of the Council then produced a schedule for the 'good of the gouvernance of the land,' in which *inter alia* was:

> 'Item, that alle the Billes that shal be putt unto the Counsail, shuld be onys in the woke att the lest, that is to seie, on the Wednesday redd before the Counsaill and their ansueres endoced by the same counsaill, and on the Friday next folowyng declared to the partie suying Item, that alle the billes that comprehende materes terminable atte the commune lawe that semeth noght fenyd be remitted there to be determined, but *if so be that ye discrecion of the counsaill feele to greet myght on that oo side, and unmyght oo that othir.*'

This exception seems sufficiently large. Moreover the clerk of the Council, as far as he can, 'shall espye which is the

[1] L'ordinance faite sur le gouvernment a tenir par le counsail du Roi. Primierement que les seigneurs du Consail se taillent estre au consail parentre oyt et noef de la clokke ou plustard,' &c. (*Bib. Cott. Cleopatra*, F. iv, p. 1. 1).

porest suyteurs bille and that first to be redd and ansuered' and the King's serjeant to help him without fee [1].

A certain amount of light is thrown on the state of the country at this time by two cases which are preserved in Nicholas. In the fifth year of Henry VI [2], one William Wawe, a highwayman 'quidam iniquitatis filius,' had broken out of prison and robbed churches. The Council offers £100 to any one who will produce 'coram nobis ipsum seu corpus aut caput ipsius si interfectus fuerit.' He took sanctuary at Beaulieu Abbey and the abbot was instantly called on to produce his franchises, 'si quas habeat de retinendo persona Willī Wawe,' heretic, highwayman, traitor, &c. What happened does not appear, but William was shortly afterwards arrested and satisfactorily hanged.

The Council and public order, justice, and police.

In the seventh year of Henry VI [3], one John Roger confesses that he has infringed the statute regulating export of wool. All the judges are summoned to advise whether he should be let off with a fine or sent to trial. The judges say 'fine him, for the jury will probably be bribed by the said Roger.' Fined accordingly 200 marks *or more if he can pay.*

Whether it was that towards the end of the long war there were signs of anarchy appearing in the country, and the ordinary administration of justice was hindered, which seems very probable, or whether it was that the Council knowing the subservience of the Commons desired to put their authority on a statutory basis, an Act was procured (31 Hen. VI, c. 2) which must have been of some value.

It recites that complaints had been made to the King of great riots, extortions, and oppressions; that his letters summoning offenders before Council and Chancery are frequently disregarded, and it enacts that the Chancellor shall in such case issue writs of proclamation to the sheriffs of the county,

[1] Rot. Parl. 2 Hen. VI, iv. 201; Nicholas, *Proceedings of Privy Council*, iii. 148.

[2] Ibid., iii. 257.

[3] Ibid., iii. 313.

the adjoining county, and of London, the proclamation to be made three times, with heavy penalties of forfeiture and fine on contumacy. It was a seven years statute only, but the doctrine that the disobedience to a privy seal or a subpoena was a contempt against the King became well settled. Outlawry could not issue on this new process, so it was enforced by a 'commission of rebellion.'

The very next year we find a royal letter to the Earls of Salisbury and Northumberland [1] reminding them that they are in the Commission of the Peace yet that they had taken upon them 'to make the greatest assembly of our liegemen that ever was made,' and threatening that if any one perished in consequence they should be 'so chastised that both ye and they and all our subjects shall have matter and cause to eschew to attempt anything like hereafter.'

Lord Egremont for the same conduct is admonished to 'surcease such novelries' and to keep the peace [2].

There is no difficulty in believing that in these stirring times the office of sheriff was no bed of roses. Sheriffs in fact could not be found. On the 9th of December, 1455 (34 Hen. VI), the Council writes to Hugh Lowther and tells him that he must be Sheriff of Cumberland on pain of £2,000 fine, the King not admitting 'any excusation [3].'

Sir F. Palgrave gives two cases, from which we can see the sort of complainant and complaint which came before the Council and what the Council did.

1. John Rukke, husbandman, of Essex, complains of false imprisonment, and wrongful disseisin.

He gets (*a*) writ of habeas corpus cum causa returnable in Chancery for the imprisonment. This would produce the plaintiff; (*b*) subpoena returnable before King and Council for the wrongful disseisin. This would produce the defendant.

2. John, Lord Strange is complainant.

[1] Nicholas, *Proceedings of Privy Council*, vi. 159.
[2] Ibid., vi. 161.
[3] Ibid., vi. 271.

Roger Kynaston who was second husband of plaintiff's mother unlawfully retained certain lordships on the Welsh Marches in which his wife had only a life interest. There had been an arbitration and award against Kynaston; Kynaston would not obey it, being very powerful. Strange came to the Council. Letters missive under the signet were issued; Kynaston paid no attention; then letters issued under the privy seal; Kynaston waylaid the messenger, John Gough, and sorely beat him. Then issued a writ of proclamation; the defendant did not come in.

A commission of rebellion was then directed to the Earl of Shrewsbury, Lord Herbert, and the Sheriff of Salop.

They do not seem to have been very active, so plaintiff comes and asks for a privy seal to issue to them directing them to execute their commission, with concurrent writs of proclamation to the sheriffs and justices of Salop, Flint, Hereford and Chester directing them to assist in arresting Roger, and that none is to help him on pain of being put out of the King's protection.

And on November 12, 7 Ed. IV, it was ordered by the King and Council sitting in the 'Starre Chamber' that the Chancellor should make these writs.

CHAPTER XII

THE CRIMINAL JURISDICTION OF THE COUNCIL. THE STAR CHAMBER

The true value of the Council jurisdiction recognized.

It is worthy of note that although during the reigns of Edward III, Richard II, Henry IV, V, and VI, petitions were frequently presented on the subject of the Council's jurisdiction, yet the objections seem rather to have been against the methods by which and the occasions when the jurisdiction was exercised, than against the jurisdiction itself.

They were mainly aimed at the arrest of persons by the Council's pursuivants on mere suggestion, which might be unfounded, and was possibly malicious. This explains the provision we have mentioned, that the Chancellor shall mulct in damages those who make untrue suggestions. Moreover, it is quite clear that the Commons were sensible of the value of this procedure, if it were employed on the proper occasions, as we gather from the petitions temp. Richard II where it is prayed that people may not be forced to answer finally in the Council in matters cognizable by the ordinary courts, but that they should be concerning oppressions.

There is a very remarkable entry in Y. B. 1 Hen. VII, Term. Mich. 3: 'The justices were at Blackfriars upon the matters brought by the King before Parliament and there were moved many good statutes profitable to the realm *if they could be executed.* And the C. J. said that the law could never be well executed until all the lords be resolved

effectually to execute them. And he said that in the time of Edward IV when he was attorney all the lords swore to keep these statutes. Nevertheless afterwards in the Star Chamber it appeared that certain of the lords made retainers directly contrary to these laws and oaths.'

The Star Chamber.

The name 'Star Chamber' dates from 1347 when a new Council Chamber was added to Westminster Palace. Mr. Baildon has in his excellent book [1] published the tiler's bill for working on the roof of the 'Sterred Chambre' within the palace in 1348, and later the expressions 'Camera Stellata,' 'Chaumbre du conseil esteillee,' occur indifferently and referred almost certainly to the ornamentation used in the new room. It should be remembered that the 'Court of Star Chamber' was merely a short title, and that the official style was 'the Lords of the Council sitting in the Star Chamber.'

The Star Chamber Act.

In Henry VII's reign what is known as the Star Chamber Act [2] was passed. 'The King our said sovereign lord remembereth how by unlawful maintenances, giving of liveries [3], signs and tokens and retainders . . ., or otherwise embraceries of his subjects untrue demeanings of sheriffs in making of panels and other untrue returns, by taking of money, by juries, by great riots and unlawful assemblies, the policy and good rule of this realm is almost subdued, and for the not punishing of these inconveniences, and by occasion of the premises little or nothing may be found by inquiry [4] whereby the laws of this land in execution may take little effect to the increase of murders, robberies, perjuries and unsureties of all men living, and losses of their lands and goods to the great displeasure of Almighty God.'

[1] *Les Reportes in Camera Stellata*, 1593–1609, privately printed 1894, p. 462.

[2] 3 Hen. VII, c. 1.

[3] 'Where a man gave liveries he should have a great company at his disposal, so that men would fear to execute the law upon him' (*Year Book*, 6 Hen. VII, fo. 13).

[4] viz. where grand juries refused to present.

The remedy is provided, that by bill or information put to the said Chancellor for the King or any other against any person for any misbehaviour before rehearsed, the Council have authority to call before them by writ or by privy seal, the said misdoers or any one else and *examine* and punish them after their demerits.

The Council was to be made up of the Chancellor, Treasurer, Keeper of Privy Seal, a Bishop, a Temporal Lord, the two Chief Justices or in their absence two other Justices. The Statute 21 Hen. VIII, c. 2, added the Lord President of the Council, an official lately created.

That the preamble of the Statute was truthful we have some evidence in a report in the Y. B. 7 Hen. VI. 9. An assize in Cumberland was adjourned to London, and the reason being asked, it was said that it was a great matter and that the parties came with great routs of armed men, 'plus semble pur vener a battaile que al assize.'

Its operation.

It is a matter of some dispute as to what the exact operation of the statute was.

Hallam's view was that this statutory court was not the Star Chamber at all, that it was in existence in 1529, but towards the end of Henry VIII's reign no longer existed, the judges being then as before Henry VII the whole of the Council, or those who happened to attend, and that no part of the Star Chamber jurisdiction could be maintained on the statute.

The opinion of Mr. Justice Stephen, with which coincides that of Lord Bacon[1], is that the statute was meant to give

[1] 'The authority of the Star Chamber, which before subsisted by the ancient common laws of the realm was confirmed in certain cases by Act of Parliament . . . There was always reserved a high and pre-eminent power to the King's Council in causes that might in example or consequence concern the state of the commonwealth, which, if they were criminal, the Council used to sit in the chamber called the Star Chamber, if civil, in the White Chamber or White-hall. The Court of Star Chamber is compounded of good elements, for it consisteth of four kinds of persons,

indisputable authority to that part of the Star Chamber jurisdiction which appeared at the moment most important, but that as it was found that the wider authority of the old court was acquiesced in, the statute fell into disuse. It is significant, as he points out, that the statute is silent about many offences which at the time when it was enacted were probably of little moment, but which in the next hundred years gave the court its chief value in the eyes of the government; libels being the most important.

But whatever the object of getting the statute, whether to make a new court, to strengthen an old one, or as Sir W. Anson suggests to impose a special duty on certain members of the Council and to require two judges to assist, it made little difference. It neither created nor abolished the sittings in Star Chamber. In that Chamber all members of the Council had the right to sit. In the reigns of Henry VII and Henry VIII the number attending is said to have been nearly forty, at a later though undetermined date only Peers and Privy Councillors attended, and in Elizabeth's reign Peers who were not Privy Councillors no longer came. In the years covered by Mr. Baildon's volume the largest number is nineteen, the smallest five, sometimes in the reign of Charles I it consisted of twenty-four or twenty-six members. The Lord Chancellor or Lord Keeper presided, and there were usually present, the Lord Treasurer, Lord Privy Seal, Lord High Admiral, and other Privy Councillors, the Archbishop of Canterbury, and the other Bishops on the Privy Council, the Chiefs of the Common Law, and when required, other Judges.

Procedure before Council: (1) Civil.

The procedure before this tribunal was threefold. In cases between private individuals, the plaintiff filed a bill, to which the defendant put in an answer and was sworn to it. If he refused to answer he was taken to have confessed the bill,

counsellors, peers, prelates, and chief judges.' (*Life of Hen. VII*, Spedding, vi. 85.)

and judgement was thereupon given. Otherwise evidence was taken by interrogatories and depositions. If a question of fact could be more conveniently determined at common law, the Court directed the issue to be tried before a jury, and the verdict certified into the Star Chamber.

(2) Criminal.

The second mode was by a complaint *ore tenus* by the Attorney-General, but this was only possible in cases where the defendant confessed his offence. The proceedings *ore tenus* originated either in 'soden reporte,' or by 'the curious eye of the State or King's Council prying into the inconveniences and mischiefs which abound in the Commonwealth.' The accused person was privately arrested and brought up and examined *viva voce* by the Council. Anything he said was taken down and if his admissions were unfortunate he was condemned *ex ore suo*, and judgement accordingly. If he declined to answer he went to prison till he thought better of it.

The third method was by a written information laid by the Attorney-General, as in the King's Bench. The defendant was brought up on a writ of praemunire or subpoena. To the information he put in an answer, which was required to be signed by counsel[1] and if such an answer was not forthcoming he was taken to have confessed the information, and judgement accordingly. After his answer was put in, he was examined on written interrogatories and the *ex officio* oath was given him. To this oath the most violent objection

The ex officio oath.

[1] This requirement was not merely formal, for a counsel who set his hand to anything unadvisedly would probably regret it. Mr. Baildon gives a case (p. 32) where a counsel who had signed a bill imputing perjury and subornation to an archdeacon and others, the charge not being substantiated was disbarred for seven years. Some plain language was heard now and then. Lord Keeper Egerton addressing counsel said, 'You muste goe to schoole to learne more witte, you are not well aduysed, you forgette yo^{r}. place, and to be plaine it is a lye.' On another occasion the Lord Keeper 'made delivery of his conceit for solicitors' (as opposed to attorneys) . . . 'that they are caterpillers del common weale' and maintenance would lie against them.

was expressed. It was in the form frequently used at the present in courts of justice and known as the *voir* (*vrai*) *dire*: 'You shall true answer make to all such questions as may be demanded of you, so help you God.' It was said to be contrary to the law of God and the law of nature, for by them *nemo tenetur prodere seipsum*. Mr. Justice Stephen observes that he thinks that the real truth was that those who disliked the oath had usually done the things of which they were accused and which they regarded as meritorious actions. Witnesses were then privately examined against him and judgement followed.

In one very important direction the Star Chamber interfered, as we should consider, most dangerously with the administration of justice. An instance will suffice. Abuse of power.

Sir Nicholas Throckmorton was tried in the Queen's Bench for high treason in 1554. After a trial in which the prisoner was treated, as we should think, with great unfairness by the Court and the Attorney-General and defended himself with extraordinary ability, the jury acquitted him. The jury were thereupon committed to prison, eight of them brought before the Star Chamber after six months and heavily fined. 'This rigour was fatal to Sir John Throckmorton who was found guilty upon the same evidence on which his brother had been acquitted [1].'

What brought about the downfall of the Star Chamber, which, unless we are entirely mistaken, was not only a most valuable but a popular court, was the extraordinary severity of the sentences it passed for political offences. Death was the only punishment it dared not inflict. We may note what Mr. Dicey calls the 'savage humour' displayed in the sentence passed on the man who objected on religious grounds to eat swine's flesh. He is to be imprisoned and fed on nothing but pork. It had abandoned its true function and had become the obedient instrument of the Government.

[1] Stephen, *History of Common Law*, i. 326 sq.

Mr. Justice Stephen selects some cases from the State Trials to illustrate the actual working of the Star Chamber.

Sir John Hollis and Sir John Wentworth were prosecuted 'for traducing the public justice[1].' A man called Weston had been hanged for poisoning Sir Thomas Overbury: Wentworth and Hollis went uninvited to the execution. Wentworth asked Weston if he really did poison Overbury, saying 'he desired to know that he might pray with him.' Hollis 'wished him to discharge his conscience and satisfy the world.' Hollis, besides, when the jury gave in their verdict had said, 'if he were on the jury he would doubt what to do.' Sir Francis Bacon, who was then the Attorney-General, with great grace maintained that these remarks implied that perhaps Weston's guilt was not absolutely certain. The defendants excused themselves in a polite manner. Sir Edward Coke pronounced sentence, in which he referred to cases, beginning with the case of Abimelech, made some observations on the bad habit of going to executions, and finally by way of 'censure' Sir John Hollis was fined £1,000 and Wentworth 1,000 marks, and each was imprisoned a year in the Tower. This was in 1615.

In 1632 Mr. Sherfield[2] was prosecuted for breaking a glass window in St. Edmund's church in Salisbury. He admitted that he had done so, but justified his conduct because the window 'was not a true representation of the Creation, for it contained divers forms of little old men in blue and red coats and naked in the head, feet and hands, for the picture of God the Father, and the seventh day he hath therein represented the like image of God sitting down taking his rest, whereas the defendant conceiveth this to be false.' Besides, Eve was represented as being taken whole out of Adam's side, whereas in fact, a rib was taken and made into Eve. For these and other reasons the defendant made eleven holes in the window with his pikestaff and,

[1] 2 *State Trials*, 1022. [2] 3 ibid., 519.

said one of the witnesses, 'the staff broke and he fell down into the seat and lay there a quarter of an hour, groaning.' For this Mr. Sherfield was fined £500.

Mr. Richard Chambers [1], a London merchant who had had a quarrel with some under-officers of the Customs, was summoned before the Privy Council, when he said, 'that the merchants are in no part of the world so screwed and wrung as in England, that in Turkey they have more encouragement.' For this he was fined £2,000 and ordered to make a written apology. He refused to do it, and was imprisoned for six years.

But what brought the court into the greatest odium was the severity of its sentences upon the Libellers. In 1632 William Prynne [2] was informed against for his book called *Histrio Mastix*, to which he answered that the book had been licensed, and his counsel apologized for the style of the book 'for the manner of his writing he is heartily sorry that his style is so bitter and his imputations so unlimited and general.' The sentence on Prynne was that he was to be disbarred and deprived of his University degrees, to stand twice in the pillory, to have one ear cut off each time, to be fined £5,000 and to be perpetually imprisoned without books, pen, ink or paper. Five years afterwards Prynne, Bastwick and Burton were tried for libel and were all sentenced to the same punishment as Prynne had received in 1632. As Prynne, however, had lost both his ears already he was branded on the cheeks.

It should, however, be said, as Mr. Baildon has pointed out, that these enormous fines were often, if not usually, greatly reduced 'on taxation.' He gives a list of such reductions (p. 411), for instance, a fine of £1,000 is reduced to £100, £500 to £30, and so on. And in fairness it must be admitted that cropping the ears and slitting the nose were statutory punishments, for offences such as brawling in church, and

[1] 3 *State Trials*, 373. [2] Ibid., 561.

provision was carefully made by statute for branding in case the offender's ears had already gone.

Lasting effect on the Criminal Law.

The main offences punished in the Council were for the most part unknown to the common law, perjury, forgery, riot, maintenance, fraud, libel, and conspiracy. Cognizance was also taken of *attempts* to commit certain offences such as coining, murder, burglary, and poisoning, and of blackmailing and 'entangling young gentlemen in contracts of marriage to their utter ruin *to which no statute extendeth.*' (Hudson.)

It is important to observe that the jurisdiction exercised by the Star Chamber permanently enlarged the limits of the English Criminal Law; for when the Court fell never to rise again, the King's Bench without difficulty adopted the Star Chamber view.

CHAPTER XIII

THE RELATIONSHIP BETWEEN THE PRIVY COUNCIL AND THE STAR CHAMBER

In view of the doubt which surrounds the relationship of the Council to the Star Chamber it may be useful to indicate certain facts which are, so far as the records go, beyond dispute.

The authorities.

The Proceedings and Ordinances of the Privy Council from the tenth year of Richard II were published under the direction of the Commissioners of Public Records by Sir H. Nicolas, and are now continued under the editorship of Mr. Dasent, C.B.

Unfortunately the Council Register or Book of the Council stops abruptly in the thirteenth year of Henry VI and begins again in the thirty-second year of Henry VIII. From that date we have the Council records down to the year 1588-9[1].

Mr. Baildon's Reports of Cases in the Star Chamber begin in 1593 and go down to 1609. It is unfortunate that these two sets of records do not overlap, but we shall not have long to wait, and the Selden Society promises us a further supply of material about the Star Chamber. Especially unlucky is it that we have at present no records either of the Privy Council or of the Star Chamber dating from the time when Henry VII passed his famous Act.

[1] The Camden Society has also published *Cases heard in the Star Chamber*, 1631-2, vol. 39 N.S.

The 'personnel' of the Courts

From such materials as we have we are able to determine some points with some certainty. It is important to know what persons sat respectively in the Privy Council and the Star Chamber. Though the records do not overlap there is only a gap of four years, and we may safely assume that no violent change had occurred in that time.

We are enabled to compare meetings of the Privy Council in 1587 and 1589 with meetings in Camera Stellata in 1593 and 1599.

P. C.		C. S.	
1587.	**1589.** (June 15)	**1593.**	**1599.** (May 18)
Lord Chancellor.	Lord Chancellor.	Lord Keeper.	Lord Keeper.
Archbishop of Canterbury.	Archbishop of Canterbury.	Archbishop of Canterbury.	Archbishop of Canterbury.
Lord Treasurer.	Lord Treasurer.		Lord Treasurer.
Chancellor of Exchequer.		Chancellor of Exchequer.	Chancellor of Exchequer.
Treasurer of Household.	Mr. Treasurer.		Treasurer of Household.
Mr. Vice-Chamberlain.	Mr. Vice-Chamberlain.	Mr. Vice-Chamberlain.	Both C. J. J.
	Lord Chamberlain.		
	Warden of Cinque Ports (Lord Cobham).		
	Lord Buckhurst.	Lord Buckhurst.	
	Master of Ordnance (Earl of Warwick).	Lord Stafford.	
		Chief Justice de Banco.	
	Lord Admiral (Howard of Effingham).	Chief Baron of Exchequer.	
	Mr. Secretary (Walsingham).		
	Master of the Wardrobe (Fortescue).		
	Mr. Comptroller (Sir J. Crofts).		
	Sir John Perrot.		
	Mr. Wolley (H.M.'s Latin Secretary).		

The meeting of the Privy Council on June 15, 1589, was an unusually full one, for every Privy Councillor who attended at all that year was there with the exception of the Earl of Derby, the *Magnus Seneschallus*. Sir John Perrot had but lately been sworn in, on his return from being Lord Deputy for Ireland.

In the Star Chamber list of attendances for May 18, 1599, there is a note against the entry of the two Chief Justices as follows: 'un esteant priuye counseller,' from which it is clear that the other was not.

With these lists before us it is not perhaps unwarrantable to assume that the ordinary staff of both chambers was practically the same, viz., the great officers of the household and of State and that the *differentia* is this, that the judges are present in the Star Chamber, whether they are Privy Councillors or not, but they are not to be found in the lists of attendances in the Privy Council.

almost identical.

There is another thing which is clear, viz., that the Star Chamber of 1593 is not the Statutory Court which Henry VII set up. The Statutory Court consisted of the Chancellor, the Treasurer, Privy Seal, a Bishop, a temporal Lord, and the two Chief Justices, to whom Henry VIII added the Lord President of the Council.

The Court of Star Chamber seems to have reassimilated itself to the Privy Council, but to have always availed itself of the right to call on the judges for assistance.

Although the Court of Star Chamber always sat in Camera Stellata the Privy Council sat there as well. The Council did not sit there exclusively, for the Council Book shows that it sat indifferently in the Star Chamber, Westminster, Whitehall, St. James, Somerset Place, Windsor, Hampton Court, or in any important person's house.

Nor is it possible to distinguish at first between the business transacted before the two bodies, by saying that the Star Chamber had the monopoly of the judicial or even of the criminal work.

The business done in Council.

On the 16th of November in the thirty-second year of Henry VIII[1] the Council met at Windsor and transacted *inter alia* the following business:—

Thomas Thwayts was sent to the Tower on his own confession, with instructions to the Lieutenant that if he will not tell who his informant was he should give him 'a stretche or twoo at his discrecion upon the brake.'

Order to send up Jone Benbury who had confessed to treason.

Letter to the Earl of Hereford to send to the Council the list of men appointed to have gone over at such time as the Earl was sent to Calais.

Letter to the Deputy of Calais concerning the making of the 'platt of the marches and passage about Cowbridge.'

A few days after at another Council at the same place, *inter alia* provision is made for victualling Calais, and the Bishop of Carlisle being found to be enjoying himself at Eton (of which he was Provost), and 'as it was supposed rather to have lingered the tyme at Eton rather than for any other just cause,' was told to go forthwith back to his diocese and stay there and feed his flock 'with preaching and good hospitality[2].'

Again, on Feb. 7, 1549[3], the miscellaneous business includes:—

(1) An order that one William Whitered be put in the pillory for seditious words, 'cut off one of his eares and then dismisse him with a good lesson.'

(2) Stores ordered for Guernsey.

(3) A legacy of the late king to be carried out.

(4) Deprivation of Bonner.

The Council certainly, wherever they sat, exercised freely their power of pillorying and cutting off ears[4]. When they

[1] Nicolas, vii. 83; see also, for directions for torture, Dasent, iii. 230, 407.

[2] Nicolas, vii. 88.

[3] Dasent, ii. 385.

[4] Ibid., v. 27, 30, 33.

sat in the Star Chamber itself, the business might be of the most innocent sort. On April 28, 1550, in the Star Chamber, they settled questions about English hostages, the cloth trade, unlicensed preaching, and the French treaty[1]. It made no difference where the Council met, the business transacted was the same in character. It is quite common to find the Council ordering persons to enter into recognizances in the Star Chamber, but this practice is not invariable, the recognizances might be entered into before the Council.

From an inspection, however, of the last volumes of the Privy Council acts, I draw the inference that the Council was giving up its judicial business, probably to the Star Chamber. There is nothing of the nature of a criminal trial, and in the civil cases which come before them on petition, the procedure seems to have been a reference, or a commission to some persons, sometimes the Lord Mayor and Recorder of London, to investigate the merits and certify the Council on the matter, whereupon presumably the Council saw that justice was done[2]. It may be, that this year, 1588–9, the Council was too fully occupied with foreign affairs to attend to judicial business. The Council gives up judicial business.

Sir William Anson[3] has referred to the case of Sir W. Paulet as indicating that the Council and the Star Chamber were not only distinct but almost rival courts. It is certainly an interesting case. On Dec. 21, 1570, the Council sat at Hampton Court. Sir W. Paulet had complained against one John Young, and had been directed to put his charge in writing and bring it within eight or ten days. He had not done so, for he intended to prosecute the cause in the Star Chamber. Their lordships 'find this manner of dealing very strange and think that he hath therein much forgotten himself, and they do not intend that any complaint Sir W. Paulet's case.

[1] Dasent, iii. 19.
[2] Ibid., xvii. 122, 212, 270.
[3] *Law and Custom of the Constitution*, ii. 96.

brought before them should by the complainant himself be removed *to any other court before the same be heard by their Lordships.'* Ordered, that he bring his bill in with all speed [1].

On Feb. 12 and 13 the next year the Council was sitting at Westminster, and the matter came up again. As Sir W. Paulet had not appeared, but the defendant had, Sir William is to pay the defendant's costs, not to leave London without license, and to prosecute the matter *in the Star Chamber* [2]. Sir William Anson does not refer to this sequel, which probably was not published when he wrote.

It was a small meeting at Hampton Court, of five members: the Marquis of Northampton, Earl of Leicester, the Lord Admiral, Mr. Comptroller, and Mr. Secretary. It was a much larger meeting in London, twelve in all, but all those who were at Hampton Court were there. Are we to suppose that the Council executed a *volte-face*? I incline to the opinion that the answer is to be found in the fact that the Star Chamber, owing perhaps to the fact of the judges being members of the Court, sat only in term. December 21 would be, if not out of term, then about the last day, while February 12 would be in term. The Council may quite well have resented the tactics which combined postponing the hearing of the case, with disrespect to themselves, even when all that they would have done was, as they eventually did, to direct a hearing in the Star Chamber. From some of the entries it looks as though the Council sat in vacation—when the Star Chamber was 'up'—without the assistance of the judges, and took business, perhaps urgent business, which 'Her Majesty's Court of Star Chamber,' as we find it styled in 1588 [3], would otherwise have dealt with.

Suggested explanation.

Thus at Westminster, on July 14, 1562, the case of 'certaine scollers of the University of Oxford' came up. Six of the 'chiefest of the committers of this disorder' are to

[1] Dasent, vii. 405. [2] Ibid., viii. 12. [3] Jan. 28.

be sent 'hither,' the rest to be bound personally the first day of next term *in the Star Chamber*[1].

On May 1, 1567, at Westminster, a jury of London being this day before the Lords, were commanded to appear before *their Lordships* the morrow next after the last day of the Term in the Star Chamber, to be there further ordered[2].

One has great difficulty in believing that the Council should have felt jealousy of a court made up of themselves, and the following entry seems to show that the Council considered themselves and the Star Chamber as practically identical.

At Richmond, January 28, 1588, a letter was sent to Dr. Drury, that whereas their Lordships were given to understand by the complaint of John David . . . that there was a controversy brought before him in the Court of Delegates for the proving . . . of a will . . ., 'forasmuch as the said cause was depending before their Lordships in Her Majesty's Court of Star Chamber, where the same was to be determined, he is required to dismiss the said cause from any further proceeding in his said court for this present to the end it might be ended and determined by authority of the said Court of Star Chamber, . . . and to certify their Lordships . . . of his opinion concerning the state and equity of the same, that thereupon their Lordships might proceed to the due administration of justice in that behalf.'

The Star Chamber sat only in Term.

It seems almost certain that the Star Chamber observed the legal Terms. The records in Mr. Baildon's book never show the Star Chamber sitting on an earlier date than the last week in January. The first sitting given in 1593 is January 25; in 1594, January 29; in 1596, January 28; in 1597, February 4.

In 1596, the sittings of the Star Chamber occur as follows: January 28, 30; February 4, 6, 11, 13; April 29; May 12, 21, 25; June 1, 23; July 1; October 13, 15; November 24.

[1] Dasent, vii. 114. [2] Ibid., 347.

Not so the Privy Council.

The Privy Council in 1586–7 sat on December 27; January 1, 2, 4, 7, 8, 9, 10, 12, 15, 19, 20, 21, 24, 26, 27, 28, 29, 30, and so on.

Civil business in the Star Chamber.

In addition to its criminal business, according to Mr. Baildon, the Star Chamber exercised considerable jurisdiction in cases of disputed customs of Manors, and in cases where there was a great number either of plaintiffs or defendants, also where foreigners were parties, in deceits of merchants, in causes between corporations, mayors and commonalties, bailiffs and burgesses, or great and mighty men 'where interest drew malice and partaking.'

Besides this, a great deal of miscellaneous business was transacted there, proclamations of Orders in Council were made, the Assay of the Mint was held, and the Lord Chancellor's annual charge to the judges and justices of the peace delivered.

Its abolition.

The Court was abolished by Stat. 16 Car. I, c. 10, which recites that the matters examinable in the Star Chamber are all capable of being duly remedied at common law, and that 'the reasons and motives inducing the creation and continuance of that Court do now cease.' Though the statute mentions, as an irregularity, that the Council does not keep a Plea Roll, it does not allege that the Court was illegal. Even Sir Edward Coke said 'it is the most honourable court (our Parliament excepted) that is in the Christian world.'

The Court of Requests.

The sinister fame of the Court of Star Chamber has thrown into shadow that of other courts of analogous character and jurisdiction. The Court of Requests, of which we find some rudimentary indications in the reign of Richard II, was a court of the Privy Council sitting to hear the complaints of poor men or the king's household. It will be described later; at present it is enough to say that it was for a time closely connected with the Star Chamber, and that in two respects the history of the two courts presents similar features. Both were defined or regulated by Henry VII,

and in both the professional element became strongly represented.

Some other courts with powers as ample and methods as summary as those of the Star Chamber 'assisted' the Common Law. By Letters Patent, Henry VIII established the Courts of the President and Council in Wales and the President and Council of the North. The Court of the President and Council in the West was erected by Stat. 32 Hen. VIII, c. 50 with like authority. All three courts were subsidised by Parliament, so that 'his true subjects . . . have undelayed justice daily administered.' They had unlimited civil and criminal jurisdiction.

The President and Council: (1) of Wales; (2) of the North; (3) of the West.

Although these courts fell with the Court of Star Chamber, they were not abolished in terms. The Court of the President and Council of the Marches of Wales was expressly abolished in 1688 (1 Will. & Mary, c. 27).

The President and Council of the North had co-ordinate jurisdiction with the Border Commission which was established after the union to prevent the 'thieving trade.' Commissions of oyer and terminer were directed to an equal number of Englishmen and Scotchmen extending to certain limits on each side of the Border. 'And these meet in their Sessions and hang up at another rate than the assizes, for we were told that at one session they hanged eighteen for not reading *sicut clerici*. This hath made a considerable reform [1].'

Though the statute abolished the Star Chamber, and restricted the jurisdiction of the Council, it did not affect the right of a suitor, in one of the foreign dependencies of the Crown, to apply for justice to the King in Council. Petitions from the Adjacent islands and the Plantations were thus unaffected. And down to 1833 such petitions were heard by an open committee of the Privy Council; while in 1832 the jurisdiction of the Court of Delegates in ecclesiastical and admiralty appeals was transferred to it.

Jurisdiction still remaining in the Privy Council. Civil

[1] *Lives of the Norths*, i. 286, which see for an instance of Border justice.

It has been suggested that this Privy Council jurisdiction over foreign dominions has grown by analogy from the position of the Channel Islands which, as part of the Duchy of Normandy, retained their judicial procedure, are not bound by Acts of Parliament, and from whose courts error never lay to Parliament but to the successor of the Dukes of Normandy and his council.

and Criminal.

One degree of criminal jurisdiction still adheres in the Privy Council. If the sovereign establishes courts of justice beyond the realm by prerogative, appeal lies to the sovereign as to the fountain of justice, unless taken away by statute or charter (*Regina* v. *Bertrand*, L. R., 1 P. C. 529). The Judicial Committee of the Privy Council is regulated by statute, it was constituted by 3 & 4 Will. IV, c. 41, amended by other Acts of Parliament[1]. It can hear civil and criminal appeals from the colonies, Indies, and foreign dominions. But as regards appeal in criminal cases 'the rule has been repeatedly laid down and invariably followed that Her Majesty will not review or interfere with the course of criminal proceedings unless it is shown that by a disregard of the form of legal process or by some violation of the principles of natural justice or otherwise, substantial or grave injustice has been done' (*ex parte Deeming*, 1892, A. C. 422).

Although the Privy Councillors as committing magistrates (and every Privy Councillor is in the commission of the peace for every county in England) are constitutionally empowered 'to inquire into all offences against the government and to commit the offenders to safe custody[2], it is now usual to send such offenders like ordinary criminals before the magistrates in the usual way.

[1] 3 & 4 Vict. c. 86; 39 & 40 Vict. c. 59; 44 & 45 Vict. c. 3; 50 & 51 Vict. c. 70.

[2] Blackstone, *Inst.*, i. 230.

CHAPTER XIV

THE COURT OF CHANCERY

The extraordinary civil jurisdiction of the Council.

WHILE the Council in the Star Chamber was exercising criminal jurisdiction, it was at the same time developing an extraordinary civil jurisdiction, which eventually fell into the hands of the Council's most important legal member, the Chancellor. As compared with the Justiciar the Chancellor was, at first, a poor creature, a mere cleric, the chief domestic chaplain of the king who did the secretarial work presumably because he possessed the rare gifts of being able to read and write. He apparently resided in the palace, and we know that he had a daily allowance of five shillings, a simnel, two seasoned simnels, one sextary of clear wine, one sextary of household wine, one large wax candle and forty pieces of candle[1]. In the time of Henry II this allowance was made only *si extra domum comederit*, if he dined at home, *intra domum*, he only got three and sixpence with a slight variation in the other commodities[2]. The Chancellor indeed occupied and made the most of a position strategically valuable; he was, if one may say so, secretary and managing director all in one, and being invariably in early times an ecclesiastic he was always at the king's ear, he kept the king's soul, and the king's seal[3]. But the jurisdiction was Council jurisdiction.

The rise of the Chancellor

[1] Mad. Ex. I, 195. [2] Ibid., 42.

[3] Seals were once rare, and not possessed by common persons. Note the gibe of Ricardus de Luci the Chief Justice, 'vir magnificus et

Those who bear in mind the various facts we have already mentioned, the constant references to the Council in novel cases, the jealousy that the Council showed of the Chancellor issuing writs other than *de cursu*, the origin of the very writ of *subpoena*, the fact that the Chancellor was a most important member of the Star Chamber, and that owing to various causes the residuary royal jurisdiction was really since Edward I vested not in the King but in the King in Council, will have little difficulty in attributing the Chancellor's rise to his connexion with the Council. The petition or bill was addressed usually to the Chancellor complaining of an alleged wrong done by some one, and asking that the offender may be sent for to answer, and that a remedy may be provided. But occasionally a petition is addressed to the Chancellor and Council, thus one about 1384 [1] is 'To the Chancellor of our most redoubted Lord the King and to his most wise Council,' and another [2] somewhere after 1396 is addressed to the Chancellor 'and to the other most wise Lords of the Council of our most redoubted Lord the King.' The explanation being that the Council sat as judges in the Court of Chancery well into the fifteenth century [3]. The Chancery and the Star Chamber were the two developments of the Council: 'as the Chancery had the praetorian power for equity, so the Star Chamber had the censorian power for offences under the degree of capital.' The Chancellor, as we have seen, had charge of charters, letters and public instruments, and when seals came into use, kept the Great Seal. So to-day a man becomes Lord Chancellor by delivery of the Seal. He presided ministerially over the writ office or Chancery, and when, because the common law was inadequate in its remedies,

due to his connexion with the Council.

His duties originally ministerial.

prudens' when Gilbert de Balliol said that he had a seal. The great man 'subridens' said that it used not to be that 'quemlibet militulum sigillum habere quod regibus et praecipuis personis tantum competit.'

[1] *Select Cases in Chancery* (Selden Society), edited by W. P. Baildon, No. 107.

[2] Ibid., No. 19.

[3] Ibid., xiii.

the Stat. West. 2 (13 Ed. I, c. 24) gave to the *officina justitiae* the authority to issue writs *in consimili casu*, and still the common law courts did not take sufficient advantage of the statute, the Chancellor as representing extraordinary royal justice, was soon busy. It may be said that up to the time of Edward I the royal justice was making the common law, after that time that it was correcting it.

About the end of Edward III's reign uses of land were introduced; they were discountenanced by the common law courts but were considered binding in conscience by the Chancellor. Then the judicial activity of the Chancellor may be said to have started, though as we have mentioned, it is very doubtful if the Chancellor regularly sat alone in a judicial capacity before Wolsey's time. Sir Francis Palgrave thinks it quite uncertain whether till Wolsey sat alone in his own court and settled forms and practice, the earlier Chancellors did anything but issue writs. This is probably to say too much, but the composition of the tribunal was evidently uncertain, the cases quoted in the *Select Cases in Chancery* show as much as that. Later he sat judicially,

Thus in 1397 [1] the Chancellor alone dismisses a bill. Also in 1407–9 [2]. In 1408 [3] Chancellor and Council are sitting together, and through the reigns of Henry VI and Edward IV the Chancellor is found sitting either alone, or with other members of the Council, or with the common law judges. but not necessarily alone.

Various statutes delegated to the Chancellor parts of the jurisdiction claimed by the Council, e.g. to issue a *Capias* to the sheriff for the arrest of those who commit felonies and flee into an unknown place, and if that fails a writ of proclamation [4].

The Chancery acted on the person, it had no power like the common law courts to attach property. It could issue

[1] *Select Cases in Chancery*, No. 106.
[2] Ibid., No. 107.
[3] Ibid., No. 95.
[4] 2 Hen. V, s. 1, c. 9.

the subpoena, inattention to which was a contempt of the royal authority to be visited in the last instance by a commission of rebellion.

The Chancellor's work.

But the Chancellor's business was not confined to feoffment to uses: the jurisdiction was extended to afford relief against inequitable dealing, fraud, force, and generally in cases where the practice of the common law was inelastic. Doubtless the jurisdiction was in outline borrowed by him from the Council and strengthened by repeated acts of delegation. The following cases taken mainly from the Calendars of the Proceedings in Chancery (temp. Richard II—Elizabeth) show the variety of the complaints which came before him.

Kymberley v. *Goldsmith*. Bill for non-delivery to plaintiff 'to his importable losse and hindryng' of a ton of woad which defendant had sold him and which had been paid for in wool [1].

A petition from 'your poor orator William de Egremont parson of Workington' alleging that one Richard Goldsmith did horribly assault him in church, and imprisoned his servants till he paid £10 as ransom. That our Lord the King had sent writs, but only with the result of making him 'more malicious and horrible than ever,' and that he subsequently attempted to murder plaintiff on the highway and still threatens him so that he durst not abide in the country or live in his parsonage (prayer for subpoena and that the defendant find sufficient surety of the peace) [2].

Hodges v. *Harry*, temp. Henry VI. Petition to Chancery to restrain defendant by oath from using the 'sotill craftys of enchantement wychecraft and sorcerye' whereby 'he brake his legge and foul was hert [3].'

Godard v. *William Ridmynton*, probably temp. Henry V. Bill addressed to the Master of the Rolls complaining that defendant had ravished his servant maid, and beseeching the

[1] *Cal.* i. xx.
[2] *Select Cases in Chancery*, No. 55.
[3] *Cal.* i. xxiv.

Master of the Rolls to 'tenderly consider the premissis and thereupon to set due correction [1].'

John Staverne v. *John Bonynton.* Petition to the Chancellor for a writ of subpoena to be directed to a witness to come and give evidence, and 'to declare the treweth in the matiers foresaide [2].'

A very important part of the Chancellor's jurisdiction is said to have arisen as follows. Covenants, agreements, and declarations of trust used to be entered on the Close Rolls, and it became customary to secure their performance by a recognizance acknowledged in Chancery. The power of issuing a writ of execution belonged to the court where the recognizance was, and this court accordingly had first to determine whether there had been default or not.

The following writs were employed by the Chancellor. The *subpoena*, which was an order to attend in person and was of general application. Thus a petition to the Chancellor of our Lord the King that defendant find surety of peace (1388), obtains it.

> 'Ricardus, &c., Thome Holbein, sal. Quibusdam certis de causis nos et consilium nostrum intime moventibus tibi praecipimus firmiter injungentes quod omnibus aliis praetermissis et excusatione quacunque penitus cessante in propria persona tua sis coram nobis *et dicto consilio nostro* die sabbati proximo futuro ubicunque tunc fuerit ad respondendum super hiis que tibi objicientur tunc ibidem ex parte nostra et ad faciendum ulterius et recipiendum quod Curia nostra consideraverit in hac parte. Et hoc sub poena centum librarum nullatenus omittas. Et habeas ibi tunc hoc breve. T. meipso [3].' The Subpoena.

A writ, probably of earlier date—*Quibusdam certis de causis* omitted the pecuniary penalty, and had *sub gravi indignatione* or words similar [4]. The *praemunire* writ began with the same phrase, and also the writ of *venire facias*. Quibusdam certis de causis.

[1] *Cal.* i. lix.

[2] Ibid., xix.

[3] *Select Cases in Chancery*, No. 7.

[4] Ibid., No. 17.

'Venire facias.'

This latter writ went to the sheriff, directing him 'venire facias coram nobis in Cancellaria nostra' presumably if it was thought that the subpoena would not be attended to[1]. The defendant came or was brought and was examined, viva voce at first, later by written answers, but on oath.

If anyone complained to the Chancellor that he was wrongfully imprisoned, the writ of *corpus cum causa* issued. Thus in 1388 we have the following answer to a petition from a man imprisoned as he says wrongfully for debt.

'Corpus cum causa.'

> 'Ricardus, Vicec. London, sal. Precipimus vobis firmiter injungentes quod omnibus aliis praetermissis et excusatione quacunque penitus cessante, habeatis coram nobis in Cancellaria nostra die lune proximo futuro ubicunque tunc fuerit Johannem Milner de Takely in Comitatu Essex per vos in prisona nostra de Neugate sub aresto detentum ut dicitur unacum causa arestacionis et detencionis suae. Et hoc sub incumbenti periculo nullatenus omittas hoc breve vobiscum deferentes. T. meipso[2].'

We may compare with these originals, the two most familiar writs of the present day, the Subpoena and the Habeas Corpus.

'Subpoena ad Testificandum.'

> 'Victoria, by the grace of God, &c. to . . . greeting. We command you that laying aside all excuses and pretences whatsoever you personally be and appear before . . . on the . . . of . . . there to testify the truth and give evidence. And this you are not to omit under the penalty of £100 to be levied on the goods and chattels lands and tenements of such of you as shall fail herein.' (*If* 'duces tecum' *add*: 'And that you or such of you in whose custody or power the same be do bring with you and produce before . . . (*our justices*) . . . aforesaid . . .' (*describe documents*).)

[1] *Select Cases in Chancery*, No. 18. [2] Ibid., No. 8.

'Victoria, by the grace of God, &c. to . . . greeting. We command you that you have in the Queen's Bench Division of our High Court of Justice at the Royal Courts of Justice in London immediately after receipt of this Our Writ the body of *A. B.* being taken and detained under your custody as it is said together with the day and cause of his being taken and detained by whatsoever name he may be called therein, to undergo and receive all and singular such matters and things as our said Court shall then and there consider of concerning him in this behalf, and have you there then this our writ.

'Habeas Corpus ad Subjiciendum.'

Witness.'

Injunctions.

In the reign of Henry VI we find the origin of the equitable system of granting Injunctions. There was a case [1] in which the plaintiff had given a bond in payment of certain debts he had purchased. He then, on finding that he could not bring an action to recover the debts in his own name, filed a bill before the Lord Chancellor Waynflete to be relieved from his bond. The case being adjourned into the Exchequer Chamber, the judges held that the bond being without consideration, it should be cancelled by decree, which the Chancellor accordingly pronounced. An action, nevertheless, was brought in the Common Pleas on the bond, and succeeded, the Court holding that the Chancellor could indeed imprison the contumacious party by way of enforcing his decrees, but that the party could still sue on his legal right in a court of law. To remedy this the Chancellor then introduced the *injunction* by which he forbade the plaintiff to proceed, or if he had obtained judgement, to execute it. This was a fruitful source of difference between chancery and common law which remained open till the famous battle between Coke and Ellesmere.

In the Year Book 22 Edward IV, 37, we have a premonition of variance. The Chancellor granted an injunction after a

[1] *Year Book*, 36 Hen. VI, 13.

verdict in the King's Bench on the ground that the verdict had been obtained by fraud. The Lord Chief Justice asked the plaintiff's counsel if they would not pray judgement, to which they said they were afraid of the injunction. The Lord Chief Justice said no harm could come to them except imprisonment, and if that happened 'apply to us for a *Habeas Corpus*, and we will discharge you.' The matter was apparently amicably arranged, and indeed at this period the relations between the Chancellor and the judges were close and friendly. He often consulted them, they often sat with him, some writs ran 'per curiam cancellariae et omnes justitiarios' or 'per decretum cancellarii ex assensu omnium justitiariorum.' The judges recognized the peculiar attributes of chancery, and the occasions when resort might properly be made to that court. On the other hand where a man had a remedy at common law he should not have a remedy in chancery.

The 'use.' The great advance that chancery made in this reign was with regard to 'uses.' The judges said that the *cestui que use* could maintain no action at law, for he had neither *jus in re* nor *jus ad rem.*

The Chancellors, therefore, 'with general applause' declared that they would proceed by subpoena against the feoffee to compel him to perform a duty which was in conscience binding on him, and gradually extended the remedy against his heir, and against his alienee with notice of the trust, although they held, as their successors have done, that the purchaser of the legal estate for valuable consideration without notice might retain the land for his own benefit.

Cardinal Wolsey sits alone, The tenure of the Great Seal by Cardinal Wolsey was marked by great vigour. He did not as his predecessors had done, call in the common law judges to assist him with their advice; they complained that he issued his decrees unduly: but if they disregarded him he sent for them and

reprimanded them. But he enjoyed a high reputation for ability and fidelity. So freely did he exercise his equitable authority, that the business in chancery grew enormously: of his own authority he established four new courts of equity in the king's name. Only one survived the fall of their great founder, and that was presided over by Cuthbert Tunstall, the Master of the Rolls. Till the Act 44 & 45 Vict. c. 68, the Master of the Rolls sat separately for hearing causes in chancery. In the time of Edward IV Lord Southampton, then Chancellor, gave a commission to the Master of the Rolls [1], and three Masters in Chancery to hear matters in his absence, but this was only temporary.

and makes new Courts.

The Master of the Rolls.

In Elizabeth's reign the common law judges rebelled against the Chancellor's interference by injunction. The Chancellor took the position that his jurisdiction did not affect to impeach the common law judgements: but admitting their validity merely relieved upon equitable considerations arising thereon. The judges retorted that though the Chancellor did not assume to examine their judgements, yet by his decrees he took away their effect.

The Common Law Courts and injunctions.

Parliament was approached, and by 27 Eliz. c. 1 it was made a *praemunire* to apply to other jurisdictions to impeach or impede the execution of judgements given in the King's Courts, and in the thirty-first year of Elizabeth a counsellor at law was indicted in the King's Bench for exhibiting a bill in chancery after judgement had gone against his client in the King's Bench.

The Court of Chancery, however, pursued its way undisturbed. It had experienced some difficulty in enforcing its decrees. The original process had been by subpoena attaching the person. The Chancellors not finding this entirely efficacious, invented the *commission of rebellion*, on which their officers proceeded to break open houses in execution

The commission of rebellion

[1] In the twentieth year of Edw. II, William de Armyn was made Master of the Rolls to relieve the Chancellor of the custody of the records.

of the decree and arrest the party as a rebel, and the *commission of sequestration* to sequester the party's lands. The judges disliked this last commission extremely, and went so far as to say that if the sequestrator were resisted or killed it would be only *homicide se defendendo*.

and sequestration.

Coke and Ellesmere.

In 1616 matters came to a head in the great battle between Coke and Lord Ellesmere on the subject of injunctions. In a case in which, tried before Coke, a verdict had been obtained by a gross fraud, the Chancellor perpetually enjoined the successful party from proceeding to execute his judgement. The verdict had been gained by decoying away a necessary witness of the defendant and making the judge believe he was dying. The witness was taken to a tavern, and a bottle of sack ordered for him: as soon as he put it to his mouth the emissary went back to court, and when the witness was called the emissary swore that 'he had just left the witness in such a state that if he were to continue in it a quarter of an hour longer he would be a dead man.' The Chancellor on learning this issued his injunction.

Indictments were then preferred against everybody, suitors, solicitors and counsel for a *praemunire* for questioning in equity a judgement obtained in the King's Bench.

Settlement of the dispute.

The King after taking advice with the great law officers supported the Chancellor not merely on the grounds that they gave him, but added something about it being part of his 'princely office' and suitable for his 'princely wisdom' to determine disputes between his several courts.

From that time down to the Judicature Acts the power of the Court of Chancery to issue injunctions was never disputed[1].

The strength of the jurisdiction of the Court of Chancery lay in the writ of subpoena commanding the defendant to appear, and the subsequent process against the person if its decree was disregarded. Without too roughly wounding

[1] See *Hoare* v. *Bremridge*, L. R., 14 Eq. 522.

the susceptibilities of the common law judges by acting directly against them, it obtained a virtual control over their courts by ordering a suitor on the application of the person interested to refrain or desist from enforcing his legal rights on pain of imprisonment. By this means it obtained a practically exclusive jurisdiction over such matters as mortgages and trusts in which it took a different view of the rights of parties from the courts of common law. It also obtained a jurisdiction over the restraining of wrongs, the winding up of partnerships and the taking of accounts which the courts of common law neglected to assume, and forced the defendant to make answer on oath to written interrogatories, a convenient mode of eliciting the truth, which was in strong contrast to the practice of the common law by which the parties to an action were not competent witnesses. Such indeed was the slowness and want of elasticity of the common law that had it not been for the genius of Lord Mansfield the mercantile law of this country would have found its way into equity.

Equity and the Common Law.

Though at one time the Chancellor's equity was open to the reproach of Selden that it varied with the length of the Chancellor's foot, it gradually became systematized; rules grew up because precedents were followed. Several Chancellors such as Lord Nottingham and Lord Eldon have gained fame on the ground that they powerfully contributed to this result, but justice cannot be done to them here.

The Vice Chancellors.

By 53 Geo. III, c. 24, the Crown was authorized to appoint a Vice Chancellor to help the Lord Chancellor.

By 5 Vict. c. 5 two more Vice Chancellors were appointed, on the occasion when the equitable jurisdiction of the Court of Exchequer was taken away.

The Lords Justices of Appeal in Chancery.

In 1851 were created two Lord Justices of Appeal in Chancery, who together with the Lord Chancellor should form the Court of Appeal in Chancery (14 & 15 Vict. c. 83).

From that court appeal lay to the House of Lords (§ 10).

CHAPTER XV

THE COURT OF REQUESTS

Its origin.

THE origin of this court is attributed by Palgrave and Spence to the order of 13 Ric. II regulating the procedure of the Council[1], which said that the Lord Privy Seal together with such of the Council as were then present should expedite (*exploiter*) the bills of the lesser folk, and hence Palgrave deduces the claim of Lord Privy Seal to preside in the Court of Requests. There seems, however, no authority for saying that the Court of Requests dated from that period. The learned editor of the *Select Cases in the Court of Requests*[2], states that he first finds the name 'Court of Requests' in 1529, and in the sentence which he quotes, 'Hereafter folowe the names of such Counsaillours as be appoynted for the heryng of power mennes causes in the Kynges Courte of Requestes,' he points out that stress is laid on the fact that the judges are Councillors.

Its connexion with the Council.

The order of Richard II made a Committee of Council, and the true view would appear to be that for a long time the court was either a delegation or an aspect of the Council, similar in character to the early position of the Court of Chancery and the Star Chamber, and deriving its authority from that fact.

Henry VII made it a definite tribunal, and nominated the

[1] Vide supra, p. 95.
[2] Edited for the Selden Society by I. S. Leadam, xiv.

members, thus turning into a permanent or standing committee what had before been a haphazard meeting of councillors. But even then, its intimate connexion with the Council and the Star Chamber is attested by the list of Sir Julius Caesar [1] which shows that all the judges in the Star Chamber from the ninth year of Henry VII down to the third and fourth of Philip and Mary sat *alternis vicibus* in the King's Court at Whitehall commonly called the Court of Requests, or wherever the king held his council, for the hearing of private causes between party and party. The Lord Privy Seal had also a seat in the Star Chamber.

The Poor Men's Court.

Wolsey placed the Court of Requests permanently in Whitehall, for the expedition of poor men's causes (1515–9). Till then, this 'Court,' as it was called, 'of Poor Men's Causes,' attended the royal person on the royal progresses, and it is not till about 1497 that its books indicate that any difference is made between term and vacation. Mr. Leadam pertinently remarks that this discrimination, when it was made, indicates that a professional element was getting control of the court. Suppliants to the court alleged usually, either that they were too poor to sue at common law or that they were king's servants attending the royal person.

Its composition.

When the professional element first appeared in the court it is hard to say, but at the end of the reign of Henry VIII 'the court was composed of professional lawyers, civilians and canonists, and the judges were styled Masters of Requests [2].'

Since the accession of Henry VII the court had never been idle, in especial, it had taken the part of copyholders who were suffering under the enclosures of their lords. When the dissolution of the monasteries had given estates to needy courtiers, and rising prices made land more valuable, the tenantry were forced to invoke assistance in increasing numbers, and the legal element in the court became more

[1] *Select Cases in Court of Requests*, cvi, cviii.

[2] Ibid., xvi.

prominent. Two permanent judges, 'Masters of Requests Ordinary,' 'began towards the end of Henry VIII's reign to control the work of the court[1].' Elizabeth being much in love with royal progresses, required the old machinery to deal with such petitions of justice and grace as were presented to her *en route*. Two Masters of Requests Extraordinary were then appointed to reinforce the court, and this set free two to accompany her.

After James I acceded, four Masters in Ordinary were appointed, but as the volume of business became very heavy, and as the king still went on progresses, there were great complaints of the irregularity of the sittings and the delays which naturally resulted.

Its functions.

The functions that the court during this period discharged were analogous to those of the Council, at any rate prior to the reign of Henry VII. There is this difference, that the Court of Requests entertained only civil business, but both are alike in this, that they offered relief to those who either from disadvantages personal to themselves or from the rigidity of the common law were unable to get justice. Here was the poor man's court of equity, and it is beyond question that it attracted an abundant amount of business.

Hostility of the Common Law Courts.

Its jurisdiction was, however, to be seriously attacked. So long as it was incontestably a committee of the Council, its position was as impregnable as that of the Star Chamber. But when the councillors disappeared from the board and the purely professional element remained, it was vigorously asserted by the common law courts that here was, in effect, a new commission which the crown could not grant, and that if a suitor desired equity there was the Court of Chancery open to him.

It was doubtless the truth that however theoretically perfect the legal succession, practically this court could not, as now constituted, claim the support of immemorial custom.

[1] *Select Cases in Court of Requests*, xix.

The Privy Council, that is the active members of the Council, had become a distinct body; Privy Councillors sat in the Star Chamber, they did not sit in the Court of Requests; the Star Chamber had in addition some statutory authority, the Court of Requests had none.

On January 16, 1597, Sir Julius Caesar, one of the Masters of Requests Ordinary, writing to Lord Burghley, enclosed a memorandum in defence of the Court of Requests maintaining that it was 'member and parcell of the King's most honourable Counsell attendant on his person,' and giving one or two instances in which the common law courts had recognized the court, one case particularly in which by letter the Common Pleas requested the intervention of the Court of Requests 'being a court of equity' to stay their own common law process. This happened in 1585, but within a few years the attitude of the common lawyers had entirely changed. It is not very profitable to discuss motives, but it is certain that the extensive operations of the Court of Requests, due possibly to greater cheapness and less technicality, materially diminished the quantity of business which came to the common law courts, and thus diminished the fees payable therein. Prestige and profits were alike affected. The Requests entertained suits which, the defendants constantly said, were determinable at the common law, it issued injunctions staying suits at common law, and forbidding defendants suing the plaintiff pending the suit in the Requests or after judgement, and took bonds of the parties to perform its decrees. It is also possible that this dislike was strengthened by the growing jealousy of the Prerogative.

Sir Julius Caesar's defence.

At any rate in 1590, according to the authorities, the attack commenced. The Common Pleas, speedily reinforced by the Queen's Bench, commenced to issue prohibitions to plaintiffs in the Requests, issued writs of habeas corpus in favour of persons imprisoned by the Requests for contempt, and in *Stepney's* case (40 and 41 Eliz. 1598) it was adjudged,

according to Coke[1], that the Requests was no court that had power of judicature, but that all proceedings there were *coram non judice*, and that an arrest under a warrant of Privy Seal was false imprisonment.

When we remember Sir Edward Coke's furious indignation against the injunctions of the Court of Chancery, it is not surprising that he threw the weight of his authority against the Requests. The year after he became Chief Justice of the Common Pleas all the judges agreed that a perjury in the Court of Requests was not punishable, 'for it is but a vain and idle oath and not a corrupt oath because the Court of Requests have nothing to do with nor can examine titles of land.' *Quod nota* adds the reporter[2].

Its disappearance.

It has been generally accepted on the authority of Spence and Palgrave that the Requests never survived the blow they received in the forty-first year of Elizabeth. Now that Mr. Leadam's book is published it is impossible to hold that view. Blackstone[3] said that the court was 'virtually abolished' by 16 Car. I, c. 10 (1640), commonly known as the Act aimed against the Star Chamber and the courts of cognate derivation. 'Virtually,' for the court is not mentioned in the Act, and as a fact continued without apparently any challenge. Between April 28 and May 17, 1642, Mr. Leadam has counted in the books of orders and decrees 556 orders made! In August of that year the Civil War broke out, the Privy Seal was withdrawn, the legal machinery lost, and the court died a natural death.

[1] *Inst.*, iv. 9, fo. 97.

[2] Yelverton, 3rd ed., 111.

[3] *Comm.*, iii. 51.

CHAPTER XVI

THE COURT OF ADMIRALTY

THE history of the jurisdiction of this court is, says the Bishop of Oxford, 'as yet obscure.' Prynne[1] asserts that there was an Admiralty Court with civil and criminal jurisdiction temp. Henry I which dated from Saxon times, but his authority is the Black Book of the Admiralty which is now supposed by the best authorities[2] to have been written in the fifteenth century and of which the matter is not earlier than the fourteenth century, the references to the times of Henry I and John being considered apocryphal. Its origin.

The title of Admiral does not occur much before the fourteenth century, and then in connexion with the French possessions of the English Crown. In the Vascon Roll 23 Ed. 1, we find mention of the appointment of an Admiral of 'the Baion fleet'; in 1300, Gervase Alard was made Admiral of the fleet of the Cinque Ports, and this is the earliest known use of the title in England. The word itself was employed in the Mediterranean navies and is believed to have come from the east by way of Genoa. The office of Admiral.

The Admiralty Courts appear somewhere between 1340 and 1357, in consequence, it is said, of the difficulties experienced by us in dealing with piracy or 'spoil' claims by or against foreign sovereigns. Before 1340 there was a constant correspondence between ourselves and foreign kings on Admiralty Courts.

[1] *Animadversions*, 106.

[2] *Select Pleas in the Court of Admiralty* (Selden Society), Introd.

this topic and on the alleged inability of injured persons to obtain justice. Our courts of common law when the plaintiff was a foreigner seem to have given no redress.

The matter was brought prominently before the notice of Edward III when he had to pay out of his own pocket damages for outrages committed on his allies the Genoese by his own subjects. In 1340 the battle of Sluys which gave him maritime supremacy, and allowed him to assert his claim to be sovereign of the sea, offered him the opportunity of founding an Admiralty Court to keep the king's peace thereon.

Connexion of the Council with admiralty affairs.

Down to the early part of Edward III's reign, admiralty matters came either before the common law courts, the Chancellor, or the Council (there is one case before the Council in 1352); piracy, reprisals, and letters of marque were considered specially within the purview of the Chancellor and to be 'the most noble and eminent piece of his jurisdiction.' (Hale.)

At the same time there were several maritime towns, which had from a very early period, 'Courts of the Seaport,' which administered the law maritime, e.g. Ipswich and Padstow. Between these courts and the Admiral's Court, there arose disputes as to jurisdiction, and in consequence two statutes were passed (13 Ric. II, st. 1, c. 5 and 15 Ric. II, st. 2, c. 3), defining and restricting the jurisdiction of the Admiral, while at the same time the crown granted charters of exemption to various towns from the Admiral's authority, and in some cases, such as Yarmouth, Dartmouth, and Rochester, express grants of admiralty jurisdiction were made to the town.

We are able from the records published by the Selden Society to see what the Admiralty Courts were doing before the Statute of Richard II was passed in 1389.

In 1353 a case as to ownership of goods recaptured from pirates was tried before the Admiral and Council.

In 1357 there is an answer to the King of Portugal about

some Portuguese goods which had been taken by the English from a French ship which had 'spoiled' a Portuguese vessel. Edward III says that the Admiral had decided that the goods were good prize.

A judicial commission.

In 1360 John Pavely is made captain of the fleet *with power to hold pleas* (querelae). This is the first instance of such a commission. In the same year Beauchamp is given the command of the fleets of the north, south, and west, with grants of maritime jurisdiction.

In 1361 a commission to Sir R. Herle to try a case of piracy and murder *according to the common law*, was recalled on the advice of the Council, on the ground that by common law, felonies, trespasses, and injuries done on the seas, should be tried by the admiral by the law maritime.

Exclusive jurisdiction of the Admiralty.

The theory of the common lawyers was that all matters arising outside the jurisdiction of the common law, i. e. outside the body of a county, were inside the jurisdiction of the Admiralty (4 *Instit.* 134–5). Crimes committed at sea were till Statute 28 Hen. VIII, c. 15, indisputably within its jurisdictional competence. 'That this court had originally cognizance of all transactions civil and criminal, upon the high seas in which its own subjects were concerned is no subject of controversy' (per Lord Stowell in *The Hercules* [1]). And in fact, criminal cases even of the degree of capital were habitually tried in the Admiralty, sometimes without a jury, down to the time of Henry's statute. Piracy, we may notice, was seemingly not a common law felony, for in 1429 Parliament petitions that it may be made so, and gets for an answer, *Le Roi s'advisera.*

In 1364 there occurs a *supersedeas* to justices, to stay proceedings on an indictment for a nuisance by driving piles into the beds of certain creeks near Colchester, *because it had been dealt with in the Admiral's Court.*

In 1369 an action on a charter party is tried before the

[1] 2 Dod. 371.

Admiral, and an action on the same matter in the sheriff's court of London is stayed on production of the certificate.

The two statutes of Richard II (13 Ric. II, st. 1, c. 5, and 15 Ric. II, st. 2, c. 3) may be conveniently read together.

Statutory limitations in the interest of the Common Law Courts.

The first recites the complaints against the Admirals and their deputies holding sessions in divers places within and without franchises, impoverishing the common people &c., and the second provides that the Admiral's Court is to take no cognizance of contracts, pleas, and quarrels, and all other things arising within the bodies of the counties: but it may take cognizance of the death of a man and mayhem in great ships hovering in the main stream of great rivers, only beneath the bridges of the same rivers nigh to the sea, and in no other places.

The precedents in the Black Book of the Admiralty show that the business of the court during the fourteenth and fifteenth centuries consisted of criminal, mercantile, and shipping cases.

The first patent for a judge of the Court.

In 1482 we have the first patent appointing a judge of the Admiralty Court, to hear cases 'de iis quae ad curiam principalem Admirallitatis nostrae pertinent' (Pat. 22 Ed. IV, pt. 1, m. 2).

In 1509–19 Henry on his accession made treaties with France providing for special tribunals to speedily try piracy claims. In England, the Earl of Surrey the Lord High Admiral, Cuthbert Tunstall, M.R., and Christopher Middleton, judge of the Admiralty, were appointed judges. Judgement was to be given on the merits 'sine strepitu et figura judicii sola facti veritate inspecta.' No appeal was allowed, except to the Council on bail.

Till that reign the Court of Admiralty exercised both civil and criminal jurisdiction in virtue of the royal prerogative. It was nearly connected with the Council, and it was independent of the common law.

Criminal

As in that reign its powers were much curtailed, it is

probably convenient to deal first with the history of its criminal jurisdiction. Juris-diction.

The Statute 28 Hen. VIII, c. 15, recites that people committing offences on the sea often escape punishment, because it is hard to get witnesses, if the prisoners will not confess, which they will not do without torture. Accordingly all treasons, felonies, robberies, murders, and confederacies committed within the admiralty jurisdiction shall be judged according to the Common Law, before the Admiral or his deputy, and three or four other substantial persons appointed by the king.

Henry VIII's settlement: victory of the Common Lawyers.

As a fact these 'substantial persons' were always common law judges, who thus gained the control of this mixed commission.

Recent legislation.

Then came some very intricate legislation which produced the result that all crimes committed at sea can be tried before any court in England if otherwise competent, or before any Supreme Court in a colony, or any High Court in India.

By the Central Criminal Court Act (3 & 4 Will. IV, c. 36) that court was empowered to try all offences committed within the Admiralty jurisdiction.

By 7 & 8 Vict. c. 2 (1844), all commissioners of Oyer and Terminer or Gaol Delivery have all the powers which the commissioners under the Act of Henry VIII would have had. The Consolidation Act of 1861 is to the same effect.

Besides these statutes, the Merchant Shipping Acts make similar provision for the punishment of crimes committed at sea.

Admiralty jurisdiction begins below low watermark, such being not within the body of any county, and when the tide is in, below high watermark.

The three mile limit.

In the case of *The Queen* v. *Keyn* (L. R., 2 Ex. D. 63), the majority of the judges held that the Admiral's jurisdiction does not extend over a crime committed *by a foreigner on board a foreign ship* within three miles of the coast. This was

amended by the Territorial Waters Jurisdiction Act, 1878, but it was provided that proceedings in such a case shall not be instituted without the consent and certificate of a Secretary of State.

Civil jurisdiction.

With regard to the *civil* jurisdiction of the Admiralty, the common law courts never attempted to prohibit the Court of Admiralty in relation to *wrongs* committed on the high seas. But the jurisdiction with regard to contracts was bitterly contested.

By Statute 32 Hen. VIII, c. 14, the Admiralty got jurisdiction to try cases on contracts made abroad, bills of exchange, charter parties, insurance, average, freight, non-delivery of cargo, damage to cargo, negligent navigation, and breach of warranty of seaworthiness.

By his letters patent the king conferred wide jurisdiction, 'statutis in contrarium non obstantibus,' previous patents having always been limited agreeably to the statutes of Richard II. The letters patent of 1547 include 'any thing, matter, or cause whatsoever, done or to be done as well upon the sea as upon sweet waters and rivers from the first bridges to the sea throughout our realms of England or Ireland or the dominions of the same.'

On the death of the Earl of Lincoln, the Lord High Admiral, in 1585, the question arose whether the judge of the Admiralty Court could sit and decide cases during the vacancy. The Queen was advised that he could, that the judge was appointed by the king's letters patent, so that he was judge of the Admiralty, 'be there an admiral or no admiral.' The Queen, nevertheless, *ex abundanti cautela*, issued a special commission.

Jealousy of the Common Law Courts.

About 1570 we find the Admiralty complaining that the common law courts are encroaching. The Queen then wrote to the mayor and sheriffs of London that this is 'very strange,' and tells them not to do so. But the complaints still go on, and, in 1575, a special commission issues

to the Admiralty, empowering it to hear cases on charter parties, bills of lading, bills of exchange, insurance, freight, bottomry, necessaries for ships, and contracts binding ships, others being prohibited from taking cognizance of such pleas.

Shortly after this, it is said that the Admiralty Court and the common law judges came to an agreement as to the limits of their jurisdictions as follows:— A 'concordat.'

(1) After sentence pronounced by the Court of Admiralty, no prohibition to be granted at common law unless applied for within next term.

(2) The judge of the Court of Admiralty to be allowed to appear and show cause against the prohibition.

(3) The judge of the Court of Admiralty is by custom, time out of memory, to have cognizance of all contracts and other things arising beyond and upon the sea without let or prohibition.

(4) The Court of Admiralty to have cognizance of breaches of charter parties over sea voyages according to 32 Hen. VIII, c. 14, though such were made within the realm.

In 1632, the judges were summoned to the Privy Council to advise on the same matter, and they signed a paper much to the same effect.

But the rivalry continued. The common law gave no remedy in cases of contracts made or torts committed abroad. The Admiralty jurisdiction was taken to supply this deficiency, but not to apply within the body of a county. The common law watched the proceedings of the Admiralty with great attention and issued prohibitions without mercy. The Admiralty vainly asserted its jurisdiction over claims for necessaries and materials supplied to ships or over charter parties. Unless the contract was actually made, or the goods actually supplied on the high sea, the prohibition went, for the Admiralty was not a Court of Record. The Common Law and Admiralty jurisdictions mutually exclusive.

Blackstone[1] writes, 'it is no uncommon thing for a plaintiff The fiction

[1] *Comm.*, iii. 106.

of the Common Lawyers.

to feign that a contract really made at sea was made at the Royal Exchange or other inland place, in order to draw the cognizance of the suit from the Court of Admiralty to those of Westminster Hall.'

The Admiralty jurisdiction over contract thus gradually fell into disuse, and the same fate befell with torts of a 'transitory' description.

Legislation.

In consequence of the great inconvenience caused to parties by this state of affairs, in 1840 the first Admiralty Court Acts were passed[1], which increased the jurisdiction of the court, and gave it power to enforce its decrees. In 1854, the Merchant Shipping Act, and the second Admiralty Court Act[2], increased its procedural efficiency, and its powers with respect to cases of wages and salvage.

In 1861, the third Admiralty Court Act[3] gave it almost all the jurisdiction it asked except in cases of charter parties, viz. over claims for building, equipping, and repairing ships, claims for necessaries supplied to ships, claims for damages to cargo imported, claims for damages done by ships, questions touching ownership, claims for wages and disbursements by masters, and in respect of registered mortgages.

The jurisdiction conferred by the Act might be exercised either by proceedings *in rem* or *in personam*.

After the third Admiralty Court Act was passed, the advantages of speedy administration of justice were so obvious that the jurisdiction was delegated in the smaller cases to the county courts around the coast, by the County Courts Admiralty Jurisdiction Act, 1868, the operation of which was extended by another statute passed the next year. The old local maritime courts had been abolished by the Municipal Corporation Act, 1835[4], the Cinque Ports Admiralty Court alone surviving.

Old maritime Courts abolished.

Admiralty appeals.

Appeals from the Admiral went in the fifteenth century to

[1] 3 & 4 Vict. cc. 65 & 66.

[2] 17 & 18 Vict. cc. 78, 104.

[3] 24 & 25 Vict. c. 10.

[4] 5 & 6 Will. IV, c. 76.

delegates appointed by the crown, or special commissioners *ad hoc*. In 1534[1] commissioners called Delegates of Appeals were appointed to hear appeals from the Ecclesiastical and Admiralty Courts. Their powers were by 2 & 3 Will. IV, c. 92, transferred to the King in Council, and by 3 & 4 Will. IV, c. 41, the Judicial Committee of the Privy Council was formed to take all appeals which may be brought before the King in Council.

By the Judicature Act of 1873, the Court of Admiralty was merged in the High Court of Justice, and so indirectly obtained jurisdiction over all maritime causes, though limited as to its jurisdiction *in rem*, to those causes as to which such jurisdiction was either original or given by statute. Appeals lie to the Court of Appeal and thence to the House of Lords.

Merger in the High Court of Justice.

The Vice Admiralty Courts in the Colonies.

These were established as a means of giving effect to the existing jurisdiction of the Admiral's Court.

The Colonial Vice Admiralty Courts.

In 1832, in view of doubts felt as to the jurisdictional competence of these courts in causes of action arising outside the limits of such colonial possession, the statute 2 & 3 Will. IV, c. 51 was passed declaring this jurisdiction to exist in those cases usually tried in the Admiralty Court, viz. collision, salvage, pilotage, bottomry, respondentia, &c.

From these courts, appeal lay to the Privy Council.

By the Vice Admiralty Courts Act, 1863[2], it was enacted that the governor of a colony should be *ex officio* vice admiral, and that the chief justice of a colony should be *ex officio* the judge of the court. The matters over which the court was to have jurisdiction were set out in sec. 10, whether or no the cause of action arose within or outside the limits of the

[1] 25 Hen. VIII, c. 19.

[2] 26 Vict. c. 24.

colonial possession. Appeal lay to the Privy Council within six months.

In 1890 the Colonial Courts of Admiralty Act[1] was passed. By it every court of law in a British possession, having in the said possession original unlimited civil jurisdiction, shall be a Court of Admiralty, and can employ in its Admiralty jurisdiction all the power it possesses for its other civil jurisdiction. Its jurisdiction shall be the same as the Admiralty jurisdiction of the High Court in England and it shall exercise it in like manner.

Appeal lies to the local Appellate Court and thence to the Privy Council.

[1] 53 & 54 Vict. c. 27.

CHAPTER XVII

THE ECCLESIASTICAL COURTS

BEFORE the Norman Conquest, the law of the National Church consisted of a body of canonical law containing the Scriptures, the Creeds, and the canons of General Councils which were recognized as authoritative in the whole Western Church, and secondly the decrees of National Councils, manuals of discipline known as 'Penitentials,' some foreign canons, and the legislation of Christian kings. The union between Church and State was complete and entire. **The law of the Church.**

The proper court of the Church was the Court of the Bishop: his jurisdiction was personal and could be exercised anywhere, *in camera* or *in itinere*, and the bishop's executive officer was the archdeacon. The bishop was also a secular lord, and had a recognized place in the courts of the Hundred, the Shire, and the Witan. In these secular courts, it is supposed [1] that offences of a mixed character were tried which were liable to both civil and ecclesiastical penalties, such as adultery and detention of tithe. The procedure is assumed to have been ordinary, viz. by ordeal and compurgation. The Metropolitan authority of the archbishop was recognized by the bishops.

Provincial synods were from time to time summoned, and were attended by the clergy, and sometimes by the king and the lay lords. In them canons were passed, and occasionally bishops were removed from their sees. It is very

[1] *Report of the Ecclesiastical Courts Commission*, 1883.

doubtful if there was any appeal to a superior court secular or religious at that time, and no traces have been discovered of appeals to Rome.

The Canon Law.

The Conqueror as in secular so in ecclesiastical matters imposed no new code of law. The law was still the traditional law of the Church, which was always liable to be altered by the decretals of the popes, which were the statute law of the Church. No doubt the king, by Acts of Parliament and by judicial Prohibitions, could and did narrow the area in which the law of the Church was operative, but within that area, till the Reformation, the Church observed its own law, and gave its own decisions in its own courts [1]. The activity of the Conqueror was directed rather to the proper administration of the laws civil and religious, than to new legislation which in matters ecclesiastical was always carefully watched by the Crown.

Effect of William's edict.

The edict of William which severed the civil and spiritual courts was pregnant with far reaching results, but its immediate effect was to develop the machinery of ecclesiastical judicature. The tribunal was no longer of a mixed character, the laity were no longer united with the clergy. Dioceses were divided into archidiaconal districts, and a regular system of appeal was instituted. This activity first manifested itself in the vigorous growth of the Archdeacon's Court, which within fifty years had usurped a customary jurisdiction which began to seriously rival that of the Bishop. To meet this competition the bishops created Officials, Chancellors and Commissaries, trained experts whose duty was to represent the bishop in his court. This delegation did not prevent the bishop from sitting himself were he so minded, and these offices though strictly tenable during the bishop's pleasure became by usage life appointments.

The Church Courts.

From the Archdeacon's Court appeal lay to the Bishop,

[1] For a full treatment of this subject see *Canon Law in the Church of England*, by Prof. Maitland.

from the Bishop to the Archbishop, and according to foreign custom thence to the Pope. But the Pope was not merely the ultimate court of appeal, he was an omnicompetent court of first instance for the whole of Christendom 'dominus papa judex est ordinarius singulorum [1],' and he could and did delegate his jurisdiction either generally or in particular cases; and in this country his delegates would be English ecclesiastics appointed by the papal rescript. In such a case the plaintiff applied to the pope for a writ or *breve* just as in a secular matter he went to the king's chancery. Popes also appointed resident legates to represent them, and when this step was objected to by the kings, clothed the Archbishop of Canterbury with legatine authority which had the effect of making it quite uncertain in which capacity, metropolitan or legatine, the archbishop on any occasion was acting. Appeals to Rome were regarded by the kings with disfavour. The Constitutions of Clarendon [2] provided that appeals from the archbishop should lie to the King's Court for failure of justice, but the panic which attacked Henry after the murder of Becket made the provision a dead letter and appeals to Rome went on as before. Henry III and Edward I both forbade their subjects to be cited out of the realm, statutes of praemunire penalized the practice, but appeals continued, till the Reformation, in those matters which lay outside the cognizance of the secular courts, viz. in testamentary and matrimonial causes.

The jurisdiction of the Pope.

The ecclesiastical system in its complete form was as follows. The kingdom was divided into provinces, the provinces into dioceses, dioceses into archdeaconries, archdeaconries into rural deaneries, and there were besides 'peculiars' belonging to the Crown, the archbishops, bishops, deans, chapters, and prebendaries. Proper courts corresponded with these divisions, provincial, diocesan, archidiaconal, ruridecanal, and peculiar.

[1] And see Bracton, f. 412.

[2] Cap. viii.

The Archbishop's Courts.

The provincial courts of the archbishop were essentially the same in both provinces. There were four in Canterbury, and two in York. In Canterbury they were, the Court of the Official Principal or the Court of Arches, the Court of Audience, the Prerogative Court (till 1857), and the Court of the Archbishop's Peculiars. In York they were the Chancery Court, and (till 1857) the Prerogative Court.

The Court of the Official Principal or the Court of Arches was the consistory of the archbishop, the court of appeal from the diocesan courts of the province, and also a court of first instance in all ecclesiastical matters. The judge was the Official Principal, he held all the judicial powers of the archbishop and stood in relation to him as the Chief Justice did to the king, process issuing in his name. He also has the style of 'Dean of Arches': originally the Dean held a subordinate position, and then the two offices were merged.

The Court of Audience was the court in which such personal jurisdiction of the archbishop was exercised as was not exhausted by the appointment of the Official Principal. It is said to have had co-ordinate authority, and process issued in the name of the archbishop. It has been suggested that perhaps the foundation of this jurisdiction was legatine. It was presided over by the Archbishop in person or by his Vicar-General.

The Prerogative Court took the testamentary and matrimonial business. If the Official Principal did not sit, another judge took his place with the style of Master, Keeper, or Commissary.

The Court of Peculiars was a branch or an aspect of the Court of Arches, exercising jurisdiction originally over the thirteen London parishes which are exempt from the jurisdiction of the Bishop of London.

In the province of York the Chancery Court corresponds to the Court of Arches, the Prerogative Court to the court of the same name in Canterbury.

The Diocesan Court was the consistory court of the bishop, and was held by the bishop's Chancellor, or Official Principal. It took all ecclesiastical causes arising in the diocese. If the see was vacant, the archbishop through the vicar-general of the province presided. The Bishop's Court.

The Archdeacon's Court originated in the functions of the archdeacon, which were at first purely executive. It was his duty to hold visitations in his district, inquiring, amongst other matters, into the condition of church fabric and church furniture. The Archdeacon's Court.

But by degrees they built up a customary jurisdiction of a more extended character depending partly on usurpation, partly on varying agreements made with the bishops. This court has now become obsolete, as also the ruridecanal court which was not strictly judicial, but was held preparatory to the visitation of the archdeacon.

The bishop's visitations gave an opportunity for hearing complaints of or by the clergy, and for correcting abuses so presented according to the methods prescribed in the 'Penitentials,' and thus became an effective part of the episcopal and archidiaconal jurisdiction.

The procedure for over three centuries before the Reformation followed the forms of the Roman Civil Law.

The Extent of the Spiritual Jurisdiction.

When the lay and spiritual courts became distinct, the Church claimed jurisdiction in two great classes of case: (1) where a clerk was accused of felony; (2) where the matter was of a spiritual nature.

The claim of the Church to try its felonious clerks produced so extraordinary a condition in the English criminal law that it is reserved for separate treatment.

The matters which the Church declared to be of a spiritual nature were numerous, and this claim has also had momentous Matters of spiritual nature.

effects on our law, for to it is directly due the difference in the devolution of real and personal property.

The Church courts assumed jurisdiction, with respect to churches, over patronage, furniture, ritual, and revenues; with respect to the clergy, over faith, practice, dress, and behaviour in church or out; with respect to the laity, over morality, religious behaviour, marriages, legitimacy, wills, and administration of intestate estates. They also concerned themselves with the maintenance of doctrine, and claimed to examine into contracts where faith was alleged to have been pledged and broken, oaths, promises, and fiduciary undertakings [1].

Suits about ecclesiastical property were always, with the exception of advowsons, claimed by the secular courts: and advowson suits were reclaimed by Henry II by the Assize of Darrein Presentment and were thereafter tried in the King's Court [2]. The King's Courts never interfered in church services, church administration, or the distribution of church revenues.

The executor.

The testamentary and intestate business fell into the ecclesiastical hands in the twelfth and thirteenth centuries. As freeholds could not be devised by will, the jurisdiction was restricted to chattel interests, and the competence of the Church courts to compel the executor to carry out the testator's directions was conceded by the king's courts without difficulty and was firmly established before Glanvill wrote. The administration of intestate estates is closely connected with

[1] In a book, now rarely to be bought, by Archdeacon Hale containing precedents of criminal cases in the Consistory Court of London (1480–1639) we find *inter alia* the following topics dealt with: fornication, adultery, incest, bigamy, rape, sorcery, unseemly demeanour in church, absence from church, the marital relations, haunting taverns and keeping bad company, defamation, tale-bearing, administering goods without the ordinary's authority, destroying parish boundaries, practising as surgeon or midwife without license, vexatious prosecution, not living in charity, and fox-hunting and fowling on Sundays.

[2] *Constitutions of Clarendon*, cap. i.

testamentary business, and naturally accompanied the testamentary jurisdiction.

The matrimonial jurisdiction rested on the sacramental and religious character of the ordinance, and was undisputed.

No objection was ever raised to the Church's jurisdiction over ecclesiastical offences committed by the clergy. With regard to the laity the Church claimed the correction of sinners for their souls' health (*pro salute animae*). So far as it dealt with such immorality as was untouched by the State, the claim was not seriously attacked before the Reformation. At the present day, indeed, it seems that if in England incest is punishable at all, it is only so in the ecclesiastical courts. But the pretensions of the Church under this head included the cognizance of breach of contract, perjury, and slander, where civil remedies coexisted, and though maintained till the Reformation were regarded with more jealousy[1]. The jurisdiction was exercised under the visitatorial and penitential system, or on express complaint, the penalties imposed were penitential, but commutable for a money payment. The efforts of the Crown were directed mainly to restricting appeals which were vexatiously multiplied, and limiting the area of the jurisdiction.

The grave offence of heresy was in the fourteenth century a novelty; and if we except the case of the unlucky Deacon mentioned by Bracton, it seems that no penalty beyond excommunication could be enforced. But the canonists of the thirteenth and fourteenth centuries took their views of heresy from the Theodosian Code, which punished people such as Manichaeans with death, and they contended that the ecclesiastical courts could convict for heresy and that the civil power was bound to act as executioner. The common lawyers however stoutly resisted this encroachment. Accordingly, in 1382, the clergy, dissatisfied with the prospective punishment of post-mortem torments, resorted to an un- **Heresy.**

[1] *Constitutions of Clarendon*, cap. xv.

†

paralleled and instructive expedient. They forged an Act of Parliament, 5 Ric. II, st. 2, c. 5, directing the sheriffs, on the certificate of the prelates, to hold 'in arrest and strong prison' heretics till they conformed. Next Session the Commons preferred a Bill stating that they had never assented to this Act, and desiring that it should be declared void. The Royal Assent was given, but the clergy so managed that this Act of Repeal was never published nor printed with the Acts of Parliament. It is now printed 3 Rot. Parl. p. 141, no. 53.

The writ 'de heretico comburendo.'

On February 26, 1400, the king, *the temporal lords assenting*, issued a writ[1] for burning one William Sawtre, who had been convicted by the Provincial Council of Canterbury as a relapsed heretic.

On March 10, 1400, the Statute 2 Hen. IV, c. 15, was passed, directing that obstinate and relapsed heretics should be burnt. This being the position, the church party maintained that it proved the existence of a writ *de heretico comburendo* at common law. If such a writ existed, it is curious that it was never used, and if it was usual, the assent of the temporal lords was not required for its issue.

The Statute of Henry IV was reinforced by a severer statute in 1414[2], and under it people were examined, punished, and burnt freely down to 1539, when the Act of the Six Articles[3] was passed defining heresy and punishing it with burning, imprisonment, and execution as a felon.

On the accession of Edward VI these statutes were repealed and the common law restored, but with the construction added, that the writ *de heretico comburendo* existed at common law, and issued after conviction by a Provincial Council.

Mary re-enacted these statutes, Elizabeth repealed them, but established the Court of High Commission, but the statute practically by its wording took no account of any

[1] 3 Rot. Parl., p. 459 *a*.
[2] 2 Hen. V, c. 7.
[3] 31 Hen. VIII, c. 14.

one but Anabaptists, i.e. Unitarians. These 'wretches abhorred in the eyes of all orthodox Anglicans' were tried and burnt under this supposed common law writ, the last execution of the kind occurring in 1612 (10 Jac. I).

In 1640 the ecclesiastical courts fell, in 1661 the ordinary ecclesiastical courts were revived, but deprived of the *ex officio* oath, and the law of heresy fell into a state of obscurity. In 1677 the writ *de heretico comburendo* was abolished by 29 Car. II, c. 9, the clergy being only permitted the use of excommunication, deprivation, degradation, and other ecclesiastical censures.

'As a mere matter of legal theory,' says Mr. Justice Stephen, 'I know of no reason why any layman who is guilty of atheism, blasphemy, heresy, schism, or any other damnable doctrine or opinion should not be prosecuted in an ecclesiastical court and have penance enjoined, e.g. the public recantation of his opinions, and on refusal excommunication, and the court on that might direct imprisonment for not more than six months[1].'

The Reformation Period.

Legislation of Hen. VIII.

By the Statute of Citations (23 Hen. VIII, c. 9) Henry forbade the citation by the Provincial Court of persons resident in the dioceses of the suffragans, and thus stopped the direct jurisdiction of the archbishop, which was perhaps of legatine character, perhaps claimed by the archbishop over his province in humble imitation of the pope's 'ordinary' jurisdiction of first instance over Christendom.

The Statute of Appeals (24 Hen. VIII, c. 12) forbade appeals to Rome: they went no further than the Court of the Archbishop.

The Act for the Submission of the Clergy (25 Hen. VIII, c. 19) disallowed any new canons made without the Royal

[1] Stephen, *History of the Criminal Law*, ii. 468.

authority. The old canons were to be revised; till revision, all canons not repugnant to the law and the royal prerogative were to stand. The immediate result of this was the desuetude of the canon law, the universities ceasing to give degrees in it as a separate faculty. Not more than seven or eight persons after that period graduated at Oxford in canon law, and then under the description of Doctors Utriusque Juris. A further appeal was allowed from the archbishop to the King in Chancery; this Court thus took the place of the pope, and was popularly known as the Court of Delegates.

The Court of Delegates.

By the Statute of Supremacy (26 Hen. VIII, c. 1) almost unlimited powers of ecclesiastical jurisdiction were assumed, and under it, a commission, of which no copy exists, was issued to Cromwell as Vicar-General and Vicegerent with large powers of visitation which he used vigorously, and which afterwards served as a precedent for the establishment of the Court of High Commission. The old tribunals remained, 'but the supreme judicature of the king exercised through special commissions of visitation and jurisdiction, and the obligation under which the bishops or some of them placed themselves by taking out commissions for the exercise of their ordinary jurisdiction, paralyzed the working of the ancient courts[1].'

The reign of Mary was retrogressive and episodical. The accession of her sister is of importance, 'the statutes passed in the first Parliament of Elizabeth for their comprehensive as well as their permanent character, embracing the whole subject of the ecclesiastical constitution and remaining in all but one important matter practically in force until the present century.'

The Royal jurisdiction in matters ecclesiastical was immediately restored. The Act of Uniformity (1 Eliz. c. 1) while providing process before lay tribunals recognized and con-

[1] *Report of Ecclesiastical Commission*, xxxiii. sq.

firmed the power of the Ordinary to reform, correct, and punish by censures of the Church all offenders against the provisions of the Act. The joint effect of the Marian and Elizabethan legislation was that the authority under which the ordinary courts were held was that of the archbishops, bishops, and ordinaries.

As the canon law had never been revised, it remained in force so far as it was not contrary to the law or the royal prerogative, and such canons and the king's ecclesiastical laws were concurrently administered by the ecclesiastical courts. To this body of law were added, canons made in convocation with royal sanction, royal proclamations, injunctions, and advertisements issued in virtue of the supremacy or under the Act of Uniformity. The law of the Church.

The ecclesiastical jurisdiction of Elizabeth was exercised by:

1. The old courts administering the ancient law modified as above stated.

2. The Court of High Commission (created under 1 Eliz. c. 1, § 18).

3. The Court of Delegates (25 Hen. VIII, c. 19).

In *Whiston's case*[1] the right of Convocation to exercise jurisdiction by examining, censuring, and condemning heretical tenets and the authors and maintainers of them, was affirmed by eight judges to four. But these expressions were extra-judicial, and the better opinion seems to be that the power of Convocation to condemn a heretical work is as well established as its incompetence to try a clerk for heresy [2].

The Court of High Commission.

By 1 Eliz. c. 1 the Crown was empowered to issue commissions for the purpose of correcting all manner of errors, heresies, schisms, abuses, offences, contempts, and enormities. Under the statute temporary commissions were at various

[1] 15 *State Trials*, 703. [2] Phillimore, *Ecclesiastical Law*, p. 1961.

times appointed. One issued on June 24, 1559, for the dioceses of York, Chester, Durham, and Carlisle, and five altogether issued during the first twenty-five years of Elizabeth's reign.

In 1583 a permanent Court was established of forty-four persons, twelve being bishops, and three making a quorum. Under the general words of the statute it exercised almost despotic powers of fining and imprisoning, even for offences of by no means spiritual cognizance. It was as arbitrary as any lay court, as inquisitorial as any ecclesiastical court. It only differed from the Roman Inquisition in having no power to kill or torture. It was for suitors a court of first instance, and was open to informers of every class, it proceeded on suspicion, information, presentation, or inquiry, and except for a short time under James I, it was subject to no appeal. It did not, however, supersede the courts of the ordinary, but exercised concurrent jurisdiction. While there is sufficient evidence of jurisdiction exercised by it in doctrinal and disciplinary matters, the largest proportion of offences comes under the head of misconduct and immorality, both of clergy and laity, and of proceedings in recusancy and nonconformity. The *ex officio* oath was largely used and twenty-four interrogatories of the most stringent type were drawn up and were administered to every 'suspect' clergyman. Not only his public performances but his private conversation was investigated. If he declined the *ex officio* oath, he was deprived and imprisoned for contempt.

The Court was abolished by 16 Car. I, c. 11, and any new Commission forbidden by 13 Car. II, c. 12. Nevertheless James II tried to revive it under the name of the 'Court of Commissioners for Ecclesiastical Causes': it was to consist of three clerics and four laymen, and Jeffreys was to preside. But James' reign came to a sudden end, and his attempt was declared illegal by the Bill of Rights.

The Court of Delegates.

The powers of this Court were full and final: it carried the full judicial authority of the Crown, and from it there was no appeal. But the Elizabethan lawyers held that in virtue of the supremacy, there remained in the Crown the power of rehearing the whole case *de novo* by a Commission of Review, issuing on a petition to the King in Council.

The Delegates could not hear appeals from the Court of High Commission, but from the ordinary courts could take appeals on all matters, with the possible exception of heresy, cognizable therein.

Its composition

The Delegates were to be 'such persons as shall be named by the king's highness.' Doctors of the civil law were always employed in conjunction with bishops or judges. The bench was made up from a rota of D.C.L.'s and the common law puisne judges. The original commission was filled by three common law judges, three senior D.C.L.'s, and three junior, taken in order beginning at both ends of the list. If sentence was to be pronounced one common law judge must concur. 'The judges in the Court of Delegates did not publicly assign the reasons of their sentence, but in deliberating on their judgement they assigned their reasons to each other and in the presence of the registrar.'

In 1830 this court was made the subject of a Royal Commission which reported in 1832. No substantial charge of injustice or excess of powers could be laid against it, though its proceedings were somewhat expensive and dilatory. 'We are informed that it seldom reversed the judgements of the Provincial Courts, that it was so far as the civilian element went frequently composed of junior and inexperienced Doctors, that its proceedings were undignified, especially the mode of payment (a guinea a day paid by the victorious party at the close of the cause to each of the judges). The

fact, moreover, that the reasons for the judgements were not given seems to have been regarded as infusing an element of uncertainty as to the nature of the law administered by the court[1].' The learned witnesses who appeared before the Commission were, however, unable to suggest anything more satisfactory.

and abolition.

In consequence of the Report the Court was abolished for almost all purposes by 2 & 3 Will. IV, c. 92 (the exception being the recourse allowed to the Delegates by the patent of a Colonial Bishop).

By the same Act Commissions of Review were forbidden; the powers of the Court of Delegates were transferred to the King in Council, and by 3 & 4 Will. IV, c. 41, went to the Judicial Committee of the Privy Council, further regulations being made by 3 & 4 Vict. c. 86, §§ 15, 16, and 6 & 7 Vict. c. 38.

Appellate Jurisdiction Act.

The Appellate Jurisdiction Act of 1876 restored to the Privy Council the jurisdiction which had for a time been menaced by the Judicature Act, 1873, and it was provided that a number of archbishops and bishops to be appointed by Order in Council, five being subsequently the number fixed upon, should sit as assessors to the Judicial Committee.

Jurisdiction of Church Courts.

The powers of the Church courts have been considerably affected by legislation.

In 1813, by 53 Geo. III, c. 127, excommunication was prohibited as a penalty for non-appearance on citation, or for contempt, irregularities which seem to have been incidental to cases of non-payment of church rates (see 3 & 4 Vict. c. 93). By 2 & 3 Will. IV, c. 93, provision was made that the orders of the courts should be enforced by sequestration.

By 18 & 19 Vict. c. 41, suits for defamation were abolished, and by 23 & 24 Vict. c. 32, ecclesiastical proceedings against laymen for brawling were similarly dealt with.

[1] *Report of Ecclesiastical Commission*, 1883.

In the case of *Phillimore* v. *Machon* (L. R. 1 P. D. 481) it was *held* that since the passing of 4 Geo. IV, c. 76, the ecclesiastical jurisdiction in perjury had gone; and that a statute giving jurisdiction to a temporal court in any matter, inferentially withdraws that matter from the cognizance of the ecclesiastical tribunals.

It should be observed that perjury in an ecclesiastical matter was properly cognizable in the spiritual courts. If it was a mere voluntary oath (*laesio fidei*) opinion fluctuated. The early view was that if the oath occurred in a spiritual matter, e.g. an oath to marry, that was for the ecclesiastical courts, but not if otherwise, e.g. an oath to pay money, for on that an action would lie at common law. The later opinion, *temp.* Edw. IV, was that in *laesione fidei* the spiritual court might punish *ex officio*, but not at the suit of the party.

Perjury 'in a judicial proceeding,' the only species now known to the criminal law, before the reign of Elizabeth was recognized in the conduct, not of a witness, but of the jury who gave a false verdict, thus making themselves liable to an attaint. In Archdeacon Hale's book there are, however, some cases where the offence is perjury to arbitrators [1].

The Court of Probate and the Court for Divorce and Matrimonial Causes.

In 1857 the Court of Probate, and the Court for Divorce and Matrimonial Causes were established, and took over the jurisdiction of the Prerogative Courts.

The Court of Admiralty.

By 20 & 21 Vict. c. 77, the Court of Probate was established, and it was provided that the judge of the court might also be the judge of the Admiralty Court at the next vacancy (§ 10). From that court appeal lay to the House of Lords (§ 39).

By 20 & 21 Vict. c. 85, the Court of Divorce and Matrimonial Causes was created and formed of the Lord Chancellor, the three chiefs and the senior puisne in each common law court, and the judge of the Court of Probate, this latter being

[1] lxx. 5, 18.

the 'judge ordinary.' From the judge ordinary appeal lay to the full court, and from that in petitions for dissolution of marriage, to the House of Lords. Under the Act the court acquired the additional power of decreeing dissolution of marriage which till then could only be effected by Act of Parliament.

The subsequent modifications of these two new courts will be found in the chapter on the Judicature Acts.

The Church Discipline Act.

In 1840 the Church Discipline Act[1] was passed which completely changed the procedure in 'causes of correction.' The jurisdiction of the chancellor in the Consistory Court was swept away, and the bishop was required to sit there in person with his prescribed assessors, five in number, one being his vicar-general, or an archdeacon or rural dean of the diocese. But the action of this new tribunal was paralyzed by the power given to the bishop, of sending any case, at any time before articles were filed, by Letters of Request to the Court of Appeal of the Province, 'a power which has been so generally exercised as to make it difficult to say whether the tribunal has or has not been satisfactory.'

This Act, which restored the bishop's personal jurisdiction over clerks who had offended against the laws of the Church or given rise to scandal, was agreeable to the Canon Law which says that to the Bishop belong, 'inquisitio correctio punitio excessuum seu amotio a beneficio[2].'

The Public Worship Regulation Act.

In 1874 the Public Worship Regulation Act[3] was passed giving an alternative procedure in case of offences against the ceremonial law of the Church. It provided for hearing by a 'judge,' appointed as below, of 'representations' of alleged infringements of the ceremonial law. The 'representation' must be made to the bishop by the archdeacon, a church-

[1] 3 & 4 Vict. c. 86.

[2] The Dean of Arches is not affected by the canon forbidding a chancellor to pronounce sentence of deprivation without the presence of a bishop.

[3] 37 & 38 Vict. c. 85.

warden, or three aggrieved parishioners, in the manner prescribed in the Act.

If the bishop thinks that proceedings should be taken, he invites the parties to submit to his direction without appeal, and, on submission, deals with the matter himself. If they decline he sends his representation on to the archbishop who requires the 'judge,' who must be a barrister of ten years' standing, or an ex-judge of the High Court, and a member of the Church of England, to hear the case. The appointment of this judge is vested in the two archbishops, his tenure is during good behaviour, and he is judge of the Provincial Courts of Canterbury and York. The same person shall be *ex officio* Official Principal of the Arches Court of Canterbury, and of the Chancery Court of York (§ 7). From him appeal lies to the Queen in Council.

This Act does not seem to have given any powers for the repression of offences which were not comprehended in those conferred by the Church Discipline Act, and 'there is no reason to suppose that any saving of time and expense is effected by the substitution of proceedings under the later for those under the earlier Act.'

The two Acts compared.

Under neither statute could any proceedings be taken without the sanction of the bishop of the diocese: and both allowed him absolute discretion as to giving his sanction. Under the former Act he need not even hear the parties (*ex parte Edwards*, 9 Ch. App. 138), nor is he bound to give any reasons for his course: under the later Act if he refuses his sanction, he must state his reasons in writing, deposit the statement in the diocesan registry and send copies to the complainants and to the clerk complained of. Under the former Act complaints may be made by any one, under the later only by those who are by reason of residence or official position directly affected. Under the former Act, the judge could issue a monition and enforce it by suspension, but not by deprivation; under the latter, a vacancy is made automatically on

inhibition after monition, should such inhibition remain in force for three years (no relaxation occurring till obedience is promised in writing), or should a second inhibition be issued on the same monition within three years of relaxation.

The Clergy Discipline Act, 1892. In 1892 a further change was made by the Clergy Discipline Act (55 & 56 Vict. c. 32), which provided that if a clergyman be convicted of treason, felony, misdemeanour on indictment, or be sentenced to hard labour or any greater punishment, or has a bastardy order made against him, or is found in a divorce or matrimonial cause to have committed adultery, or has an order for judicial separation, or a separation under the Matrimonial Causes Act 1878, made against him, then within twenty-one days of a conclusive finding, the bishop shall declare the preferment empty, and the clergyman becomes incapable of holding preferment unless he obtains a free pardon. If the bishop will not act, the archbishop shall.

Complaints against clergymen for immorality shall be heard in the Consistory Court before the chancellor of the diocese and, if either party desire, five assessors. The chancellor determines questions of law, questions of fact are found by the unanimous decision of the assessors chosen in the way prescribed in the Act, or by the chancellor and at least a majority of the assessors.

The bishop may, if he think the charges too vague and frivolous, disallow the prosecution.

The prosecutor may be any parishioner, the bishop, or any person appointed by the bishop.

Appeal at the option of the appellant may be to the Provincial Court or to the Queen in Council, but if to the Provincial Court its decision is final.

On conviction the clergyman may be deprived or suspended, and if the preferment becomes vacant he may be deposed by the bishop from holy orders.

Questions of doctrine and ritual are excluded from the

purview of the Act, but with respect to any proceedings instituted for an offence for which a clergyman can be prosecuted under the Act, the Church Discipline Act of 1840 is repealed saving certain sections which are re-enacted, under which *inter alia* the bishop can pronounce sentence by consent without further proceedings, and is empowered to inhibit the party accused from performing the services of the church pending the investigation.

The Benefices Act, 1898. By the Benefices Act, 1898 [1], the bishop may refuse to institute or admit a presentee to a benefice, on the ground, amongst others, that he is unfit by reason of physical or mental infirmity, serious pecuniary embarrassment, grave misconduct or neglect of duty in an ecclesiastical office, evil life, or having by his conduct caused grave scandal concerning his moral character, since his ordination. From his refusal, appeal lies to the archbishop of the province sitting with a judge of the Supreme Court, nominated by the Lord Chancellor from time to time, for the purposes of the Act. The judge shall decide all questions of law, and find as to any fact alleged as reason of unfitness or disqualification, and his decision thereon shall be binding on the archbishop who shall thereupon:

(1) if the judge finds that no such fact sufficient in law exists, direct institution or admission, or,

(2) if the judge finds that any such fact sufficient in law exists, decide if necessary, whether by reason thereof the presentee is unfit for the discharge of the duties of the benefice and determine whether institution or admission ought under the circumstances to be refused.

And in either case the archbishop shall give judgement accordingly, and that judgement shall be final.

[1] 61 & 62 Vict. c. 48.

CHAPTER XVIII

THE COURTS OF THE COUNTIES PALATINE AND OF WALES

Grants of Counties Palatine.

THE counties palatine were Cheshire, Durham, and Lancashire. The county palatine of Chester was granted by the Conqueror to his nephew, Hugh Lupus (see *antea*, p. 17), and afterwards became one of the honours of the Prince of Wales.

The county palatine of Durham was only slightly younger. It was granted to the Bishop of Durham by the same king.

The county palatine of Lancaster was created in 1376 by Edward III, and granted to John of Gaunt, Duke of Lancaster, for his life, the duke to hold as freely as the Earl of Chester.

Thus all three grants were of full *jura regalia*.

'The power and authority of those that had counties palatine was kinglike, for they might pardon treasons, murders, felonies, and outlawries thereupon. They might also make justices of eyre, justices of assize, of gaol delivery, and of the peace. And all original and judicial writs, and all manner of indictments of treason and felony and the process thereupon, were made in the name of the person having such counties palatine. And in every writ and indictment within any county palatine, it was supposed to be *contra pacem* of him that had the county palatine [1].'

[1] Coke, *Ins.*, iv. 204.

By 6 & 7 Will. IV, c. 19 the palatine jurisdiction of the Bishop of Durham was transferred to the Crown.

Their absorption by the Crown.

In 1461, the Duchy of Lancaster was permanently annexed to the Crown.

In 1535, 27 Hen. VIII, c. 24 provided that none but the king should have power to make any justice of assize, of the peace, or of gaol delivery, in any county palatine or other liberty, and that all writs and indictments should be in the king's name, and laid as against the king's peace.

The commissions, however, to the county of Lancaster should be under the king's usual seal of Lancaster, in manner and form as before (§ 5).

Thus the Durham and Lancashire Assizes and Quarter Sessions were assimilated to those held elsewhere, except that the Lancashire commissions were under a different seal.

Till 1830 Chester had a local chief justice and second justice both appointed by the Crown. These offices were abolished[1], and it was provided that the Assizes should be held in Chester and Wales as in other places, and that was the position at the time of passing the Judicature Act of 1873[2], which enacted that the counties palatine of Lancaster and Durham shall respectively cease to be counties palatine as regards the issue of commissions of assize or other like commissions, but no further.

The Welsh Courts.

Of the courts in Wales it is perhaps sufficient to give a brief account.

When Robert Burnel drafted the great *Statutum Walliae*[3] for Edward I, he produced a complete scheme showing the divisions of the country, the courts and the officers, sheriffs, and coroners, and the writs in actions.

Six counties, viz. Anglesea, Carnarvon, Merioneth, Flint, Carmarthen, and Cardigan, were provided with a justice, sheriffs, coroners, and courts on the English pattern.

[1] 11 Geo. IV & 1 Will. IV, c. 70.
[2] 36 & 37 Vict. c. 66, § 99.
[3] 12 Edw. I.

The rest of Wales was divided into districts called 'Lordships' Marchers,' subject to the hereditary rule of Lords Marchers who exercised despotic authority, and in which the king's writ did not run.

In 1535 and 1543 two statutes[1] were passed by Henry VIII abolishing the 'Lordships' Marchers,' and forming them into new counties, and establishing Welsh courts and judges quite separate from the English judicial system.

This arrangement lasted till 1830, when the statute[2] was passed (see above) abolishing the separate jurisdiction for the county palatine of Chester, and the Principality of Wales.

One additional judge was added to each of the Superior Courts of Westminster, and Wales was brought into the judicial system of England.

[1] 27 Hen. VIII, c. 26 and 34 & 35 Hen. VIII, c. 26.
[2] 11 Geo. IV & 1 Will. IV, c. 70.

CHAPTER XIX

THE JUDICATURE ACTS

By the Judicature Act of 1873[1] which, after being deferred for a year, came into operation on November 1, 1875, the whole judicial system of this country was remodelled. The Act of 1873.

At the time that the Act was passed the Common Law, as we have seen, was administered in the Courts of Queen's Bench, Common Pleas, and Exchequer, each with a staff of a Chief and his puisnes. From these courts lay appeal to the Court of Exchequer Chamber (Cam. Scacc.), and thence to the House of Lords. The changes made.

The equitable jurisdiction of the Court of Chancery was exercised by the Lord Chancellor, the Master of the Rolls, and three Vice-Chancellors sitting as judges of first instance. The Lords Justices sat with the Lord Chancellor as a Court of Appeal, and from them appeal lay to the House of Lords.

The High Court of Admiralty, and the Court of Probate and for Divorce and Matrimonial Causes took cognizance of their more special branches of the law under the statutes mentioned above[2].

By the Act of 1873 all these Courts were united and consolidated together and constitute one Supreme Court of Judicature in England (§ 3).

[1] 36 & 37 Vict. c. 66.

[2] P. 159.

The Supreme Court: This Supreme Court consists of two permanent divisions, Her Majesty's High Court of Justice, and Her Majesty's Court of Appeal (§ 4).

(1) The High Court of Justice. The High Court of Justice was to be constituted of the Lord Chancellor, the Lord Chief Justice of England, the Master of the Rolls, the Lord Chief Justice of the Common Pleas, the Lord Chief Baron of the Exchequer, the Vice-Chancellors, the Judge of the Court of Probate and of the Court for Divorce and Matrimonial Causes, the Puisnes of the three Common Law Courts, and the Judge of the High Court of Admiralty.

All these judges to have (except as otherwise provided) equal power, authority, and jurisdiction. In the absence of the Lord Chancellor the Lord Chief Justice of England to be President (§ 5).

(2) The Court of Appeal. The Court of Appeal was to be constituted of five *ex officio* judges, viz. the Lord Chancellor, the Master of the Rolls and the three Chiefs, and of ordinary judges not to exceed nine in number, who were to be the Lords Justices of Appeal in Chancery, the existing salaried judges of the Judicial Committee of the Privy Council appointed under the Act of 1871 (four in number), and such three other persons whom Her Majesty might be pleased to appoint by letters patent. The Lord Chancellor to be President (§ 6).

The jurisdiction of the High Court of Justice was to include all the jurisdiction of all the courts thus consolidated, together with the jurisdiction of the Court of Common Pleas at Lancaster, the Court of Pleas at Durham, Commissioners of Assize, Oyer and Terminer, and Gaol Delivery, subject to certain specified exceptions.

The new Court of Appeal was to have the powers and jurisdiction of the Lord Chancellor and the Lords Justices in equity, of the Exchequer Chamber in common law, and of the Privy Council in admiralty appeals.

Threatened de- This Act provided for the extinction of the appellate

jurisdiction of the House of Lords and Privy Council, but as this policy was reversed by the Appellate Jurisdiction Act of 1876 (*vide infra*) it needs no more than a passing observation. struction of the Lords' and Privy Council jurisdiction.

Law and equity are to be concurrently administered in every court, by every judge. Claims, defences, and relief, equitable estates, titles, rights, and all equitable duties and liabilities appearing incidentally, are to be recognized in the same manner as the Court of Chancery would have recognized prior to the passing of the Act. Law and Equity 'fused.'

Any barrister of not less than ten years' standing is qualified to be appointed a judge of the High Court (§ 9).

The judges hold office for life subject to a power of removal by Her Majesty on an address presented to her by both Houses of Parliament. No judge can sit in the House of Commons (§ 9).

By §. 31 the High Court of Justice was divided into five divisions: The divisions of the High Court:

The Chancery Division consisting of the Lord Chancellor, the Master of the Rolls, and the Vice-Chancellors. Ch. D.

The Queen's Bench Division consisting of the Lord Chief Justice, and the puisnes of the Queen's Bench. Q. B. D.

The Common Pleas Division consisting of the Lord Chief Justice, and the puisnes of the Common Pleas. C. P. D.

The Exchequer Division consisting of the Lord Chief Baron, and the barons of the Exchequer. Ex. D.

The Probate Division and Admiralty Division consisting of the existing judges of the Probate Court and Admiralty. P. D. and A. D.

By § 32 the Crown was authorized by Order in Council to alter these divisions and abolish on a vacancy any of the following offices, viz. of Lord Chief Justice of England, the Master of the Rolls, the Lord Chief Justice of the Common Pleas, and the Lord Chief Baron of the Exchequer.

(By Order in Council, December 16, 1880, the offices of Chief Justice of the Common Pleas and Chief Baron were Consolidation of the Com-

mon Law Divisions. accordingly abolished, and the Divisions of Queen's Bench, Common Pleas, and Exchequer were consolidated.)

By § 34 certain business is assigned (subject to modification by Rules of Court) to particular Divisions. Thus to the Chancery Division are assigned *inter alia* causes and matters for the following purposes—administration of the estates of deceased persons, dissolution of partnerships and taking accounts, redemption and foreclosure of mortgages, the execution of trusts, the rectification and setting aside of deeds or other written instruments, specific performance connected with sales of realty, wardship, and care of infants' estates.

Jurisdiction in matters of *law* arising in criminal trials is to be exercised by the judges of the High Court of Justice or five of them at least of whom one Chief shall be part (§ 47).

C. C. R. (This tribunal is known as the Court for Crown Cases Reserved (C. C. R.) and was originally constituted by 11 & 12 Vict. c. 78.)

The Judge on Circuit. The jurisdiction of a judge on Circuit who carries Her Majesty's Commission is not to be limited by the terms of his commission; he is deemed to constitute a Court of the said High Court of Justice (§ 29).

(Before the Act, it is said, a mandamus could issue to him if he refused to perform an obligatory duty. *Regina* v. *Harland*, 8 A. & E. 826.)

Assimilation of principles The Act after directing that in certain specified cases, as for instance, of assignment of choses in action, equitable waste, merger, and stipulations not of the essence of the contract, the old rule of the common law was to be altered for the rule of equity, lays down the general principle that wherever there is any conflict or variance between the rules of equity and those of the common law with reference to the same matter, the rules of equity shall prevail.

and practice. The Act not only affected principle but practice. Remedies once peculiar to some particular court can now be given in any Division. Thus, that practice and procedure of which

the benefit could once only be got by the plaintiff bringing a bill in chancery, is made available by interlocutory applications in all the Divisions of the High Court. The courts of common law, for instance, could give no relief against threatened injury. The courts of equity both could and did. Now, all courts can issue Injunctions. So with the remedy of Specific Performance. On the other hand till Lord Cairns' Act the courts of chancery were unable to give damages.

Till Bentham's time the common law excluded principals from giving evidence in a civil action. They were not made competent witnesses till 1851[1]. Chancery was never fettered in this way, and on the assumption that the parties to an action possibly knew more about the matter than other people, granted interrogatories and orders for production of documents, interrogatories being written questions put by plaintiff to defendant, or *vice versa*, to be answered on oath.

It does not, however, seem that by this Act the High Court can exercise powers not previously exercised by any court (*North London Railway Company* v. *Great Northern Railway Company*, 11 Q. B. D. 30).

Thus was brought about what has been called the 'fusion of law and equity.' Some would say that 'supersession' would be a more accurate description of the process. But whatever the name, the development has progressed by stages which are normal and perfectly familiar to every student of Jurisprudence, viz. Law, Equity, and Legislation.

By the amending Act of 1875[2] it was provided that the Lord Chancellor was *not* to be deemed a permanent judge of the High Court, and that the Court of Appeal was to be constituted of five *ex officio* members and not more than three ordinary members (§§ 3, 4). The Act of 1875. The Court of Appeal.

By the Appellate Jurisdiction Act, 1876[3], appeal lies to The Act of 1876.

[1] 14 & 15 Vict. c. 99.

[2] 38 & 39 Vict. c. 77.

[3] 39 & 40 Vict. c. 59.

The House of Lords.

the House of Lords from the Court of Appeal in England, and from those Scotch and Irish courts from which an appeal lay before the commencement of this Act by common law or statute.

There must be present at such an appeal not fewer than three of the following persons, designated as Lords of Appeal:

(1) The Lord Chancellor of Great Britain.

(2) The Lords of Appeal in Ordinary.

(3) Such Peers of Parliament as are holding or have held 'high judicial office' as defined in the Act.

Two such Lords of Appeal in Ordinary may be appointed by Her Majesty; to be eligible the person must have been for two years holding a 'high judicial office' or a practising barrister for not less than fifteen years. Such a Lord of Appeal is entitled to the style of Baron, and can sit and vote during his life.

(This provision comes from the amending statute, 50 & 51 Vict. c. 70.)

The Lords of Appeal, if Privy Councillors, are members of the Judicial Committee of the Privy Council, and it is their duty to sit and act as such, without prejudice however to their duties in the House of Lords (§ 6).

The hearing and determination of appeals may be proceeded with during prorogation, and even during dissolution if authorized by Her Majesty by writing under the Sign Manual.

Whereas under the powers conferred by 34 & 35 Vict. c. 91 Her Majesty appointed four paid members of the Judicial Committee of the Privy Council, it is provided that when any two of these die or resign Her Majesty may appoint a third Lord of Appeal, and on the other two dying or resigning, a fourth.

(These have died, and now there are four Lords of Appeal in Ordinary.)

Her Majesty may appoint three additional ordinary judges of the Court of Appeal (§ 15).

By the Stat. 44 & 45 Vict. c. 68 (1881), the Master of the Rolls (who since the time of Cardinal Wolsey had sat as a judge of first instance) is to be a judge of appeal only, thus ceasing to be a judge of the High Court of Justice, and the ordinary judges are to be five in number (§ 3). The Act of 1881. The Master of the Rolls and the Court of Appeal.

(There was a vacancy in the Court of Appeal which was filled by the Master of the Rolls. The Court now consists of the Master of the Rolls and five Lord Justices, not counting its *ex officio* members.)

By § 4 the President of the Probate Division and Admiralty Division shall be an *ex officio* judge of the Court of Appeal.

By § 15 the Lord Chief Justice must form part of the Court for Crown Cases Reserved unless he certifies, or his medical attendant does, that he is prevented 'by illness or otherwise' from attending.

By Stat. 54 & 55 Vict. c. 53 (1891), *ex* Lord Chancellors are made *ex officio* judges of the Court of Appeal, but are not required to sit, unless with their consent at the request of the Lord Chancellor (§ 1). The Act of 1891. Ex Lord Chancellors.

By § 4 the High Court is a Prize Court within the meaning of the Naval Prize Act, 1864: subject to Rules of Court such jurisdiction shall be assigned to the Probate Division and Admiralty Division, and appeal lies to Her Majesty in Council as under the Naval Prize Act.

Again after eight centuries we see the Curia Regis, but it is the Court at Temple Bar, and not that at St. James'.

CHAPTER XX

THE CRIMINAL JURY

Criminal trials.

SINCE the Norman Conquest there have been three modes of trial in criminal cases—by ordeal, battle, and jury: and three modes of accusation—appeal, or accusation by a private person, indictment, or accusation by a grand jury, or an information either by the Attorney-General or the Master of the Crown Office[1]. We do not count compurgation as one, for this in criminal cases did not long survive the Norman Conquest, though in a civil action, as wager of law, it maintained a shadowy existence till 1834.

Appeal

Appeals. The history of appeals and battle goes together, for battle was properly an incident of an appeal, although it found its way into the civil courts eventually. Appeals were deemed a most important part of the criminal law, as might be expected, at a time when neither justice nor police was

[1] A criminal information may be preferred only for misdemeanours, and only by the Attorney-General, the Solicitor-General, or the Master of the Crown Office 'on the order of the Queen's Bench Division made on motion heard in open Court' (cf. 4 Will. & Mary, c. 18). This was passed because the Master used to lend his name to any one who wished it, and thus private persons could frivolously bring a malicious prosecution against a defendant without the intervention of a Grand Jury.

The law officers there is reason to suppose (*R.* v. *Berchet and others*, 1 Show. 106–121, 1689) exercised this right from Edward I to the Revolution in the King's Bench without indictment by Grand Jury, and the procedure was ordinary before the Council and Star Chamber, and is recognized and regulated by several Acts of Parliament.

well organized and the principal source looked to for the administration of criminal justice was private revenge.

Trial by combat was a form of legal procedure familiar to the Normans, though there is no trace of it in Anglo-Saxon history. Ordeal was, on the other hand, well known here. Combat may be said to be a bilateral kind of ordeal: both were appeals to the judgement of God. To suit the customs of his Norman and Saxon subjects the Conqueror ordained that if an Englishman accused a Frenchman of crime, the trial should be by battle, or if the Englishman declined this mode, the Frenchman should clear himself by compurgators. If a Frenchman accused an Englishman, the Englishman could betake himself to battle, ordeal, or compurgators. In cases where there could be no battle, and no witnesses could be found, or the man was of notoriously bad character, he went to the ordeal.

A woman could only bring an appeal of rape or *de morte viri sui inter brachia sua interfecti.*

The appeal was made before the coroner. The appellor made a formal and detailed statement, in order that the appellee might know what he had to answer. The appeal was then published at five consecutive county courts. If the appellee did not appear, then judgement of outlawry was given. If the appellee appeared he raised any plea or exception he thought fit. If he did not plead, or pleaded inadequately, battle was directed between the parties, but the judges were to inquire, and not allow battle if the circumstances were such that there were *presumptiones quae probationem non admittunt in contrarium,* as for instance, if an appellee was caught standing over the dead man with a bloody knife, or taken with the 'manour.' This may be taken as an application of the general rule in our early law, that if a culprit is taken red-handed, no accuser is wanted, and no defence allowed; he is convicted. Nor was battle allowed if the appellant was maimed, over sixty years of age, or an infant. In most

cases after the disappearance of 'ordeal' appellees had the option of defending themselves *per corpus* or *per patriam*, but not always. In secret crime, such as poisoning, he must defend himself *per corpus*, for as Bracton says, the *patria* could know nothing of a concealed fact like this. If the appellee was defeated before the stars appeared he was hanged, if not, or if he won, he was acquitted from the appeal, but as the appeal raised a presumption of guilt, he was tried by the country as if he had been indicted.

in Murder. The only appeals which had any definite history were those of murder. This seems to have been the usual way of prosecuting murder to the end of the fifteenth century. Indeed, in 1482 (22 Ed. IV), it was determined that a homicide should not be arraigned at the king's suit within the year, in order to save the suit of the party. The reason for this was, that by the Statute of Gloucester (6 Ed. I, c. 9), an appellor was allowed a year and a day within which to bring his appeal. This was so mischievous, that four years after (1486) a repealing statute had to be passed, known as the Star Chamber Act, 3 Hen. VII, c. 1, which recites that 'the party is oftentimes slow and also agreed with, and by the end of the year all is forgotten, which is another occasion of murder. And also he that will sue any appeal shall sue in proper person, which suit is long and costly that it maketh the party appellant weary to sue.' Indictments for murder accordingly are to be tried at once, and an acquittal on an indictment is to be no bar to an appeal. Thus, an indictment was usually tried first, and was practically conclusive, unless the prisoner was acquitted under circumstances which greatly dissatisfied the relatives of the dead man. In 1819 appeals were finally abolished by the statute 59 Geo. III, c. 46, following on the appeal in *Ashford* v. *Thornton* (1 B. & Ald. 405).

Accusation 'per famam.' (2) *Accusation by public report—ordeal—trial by jury.* In Anglo-Saxon times in every hundred there were twelve

Thanes or freeholders, who were at the gemot to go out with the reeve and swear on the relic that they will accuse no innocent man nor conceal any guilty one (Laws of Ethelred[1]), and Alfred is said to have hanged a judge who sentenced a man to death without such presentment. The form survives to the present day in the oath of the grand jury. If the man was taken in the act, the thing was clear and he got no trial; if not, he was required to clear himself by oath, if he was oath-worthy. To find out whether he was credible or oath-worthy he had to bring up people who would support him—'compurgators,'—other freeholders, sometimes eleven, who swore that they believed him.

Present-ment.

Compur-gation.

Ordeal was apparently employed when the man was not credible, or there was want of satisfactory evidence. It was not unknown in the highest court to try and convict upon public fame alone. Thus the judgement on the Mortimers was on common fame recorded by the king: 'les quieux tresons felonies roberies homicides arsouns mavesties et chevauchees as baneres desplies sount notories et conuz el roialme et nostre Seignour le Roy ceo record sur vous.'

Ordeal.

Public fame.

In 1176 the Assize of Northampton appeared. It was a recension of the Assize of Clarendon with some additions and alterations, making it more rigorous. The provision that we are at present concerned with was this: that 'if anyone were accused before the justices of our lord the king of murder, theft, or robbery, or harbouring men who do such things, or forgery, or arson, by the oath of twelve knights in the hundred, or if no knights, twelve lawful men and four men from each township in the hundred, let him go to the ordeal of water and if he fails let him lose a foot and the right hand, and exile himself within forty days. If acquitted by ordeal let him find pledges and remain unless the accusation be of murder or base felony, when he must abjure the kingdom in forty days[2].'

[1] Stubbs, *Sel. Ch.*, p. 72. [2] Ibid., p. 151.

An accusation therefore of murder or base felony was equivalent to banishment at the least. As an instance, we can refer to the Roll of the Iter of Wiltshire, 10 Ric. I:—'The jurors say that Radulphus Parmentarius was found dead with his neck broken, and they suspect one Cristiana, who was formerly the wife of Ernaldus de Knabbewell, of his death, because Radulphus sued Cristiana in the ecclesiastical court for breach of a promise of marriage she had made to him, and after the death of her husband Ernaldus, Reginald a clerk frequented her and took her away from Radulphus, and Reginald and Cristiana hated Radulphus for suing her, and on account of that hatred the jurors suspect her and the clerk of his death. And the country says it suspects her. Therefore it is considered that the clerk and Cristiana appear on Friday, and that Cristiana purge herself by fire.'

But ordeal had not long to live. Rufus had commented on it very unfavourably as a method of discovering truth, 'a pretended judgement of God which was made favourable or unfavourable at any man's pleasure.' It is said that Henry II would not allow an acquittal by ordeal, and in Glanvill's time in a prosecution for the death of a man on sedition *regni vel exercitus*, if the prisoner was accused by public fame and by no certain accuser, he was secured by proper pledges or *per carceris inclusionem*. Then followed an inquiry by the justices, and he was either acquitted or he was put to his purgation, *per legem apparentem*, i. e. by compurgators. If on his purgation he was convicted, his life and members were in the judgement of the court and the king's grace. If accused by an appellor or a certain accuser, the appellor was bound over to prosecute, safe pledges were taken for the accused or he was imprisoned, and then battle. If he was convicted *per legem apparentem* he suffered the pains of death, if by battle there was a forfeiture as well.

Disappearance of ordeal.

The Lateran Council in 1216 condemned the ordeal, and prohibited the clergy from assisting at it. In our country

this direction met with immediate obedience. By letters patent, issued January 26, 1219, an Order in Council was sent after the judges who had already started on their eyres, telling them that the Roman Church had prohibited judgement by fire and water, and directing them that in the circumstances, if grave crimes were brought before them, the prisoners must be kept in strict custody; if there were crimes of a middle character, where ordeal would have been employed, the accused are to abjure the realm, and in trifling offences they must give pledges to keep the peace, but the judges are to use large discretion.

Difficulty about a substitute. But nothing is said in the Order about putting the accused persons on their trial. The truth was that a very great difficulty had now been raised. Trial by ordeal had gone, but the accusation by a grand jury remained, and there was no method left of ascertaining the truth of the accusation. Battle was a method of proof only allowed in the case of appeals. The king at whose suit the criminal was prosecuted could not bring an appeal, for he did not see or hear the crime[1], and he could not fight. The only way was trial by the country, just as in an appeal by a woman or a maimed man, for these were not expected to fight.

Trial *per pais*. But what was to be done if the prisoner declined to put himself upon his country? It seems that for some reason or other it was considered a hardship to try a man before a jury without first having got his consent. It may be that it was considered that mere human testimony was not enough when a man was being tried for his life. Indeed in the *leges Henrici* it is said that 'no one is to be convicted of capital crime by testimony'; apparently the judgement of God ought in such a grave matter to be invoked. It may perhaps be, as is suggested by Mr. Justice Stephen, that to go before a petty jury was a privilege, and that it was contrary to the nature

[1] 'Cadit appellum ubi appellans non loquitur de visu et audito,' Bract. ii. 434.

of things to appoint a jury to try a prisoner unless he asked for it. Sir F. Palgrave gives instances of persons accused by presentment, even before the ordeal went out of use, buying from the king the benefit of going before a petty jury, *legales milites*, to have it pronounced *utrum culpabilis sit inde necne*.

What then was to be done? It is evident that the judges hesitated, but at Warwick, Martin Pateshull, finding two prisoners who refused to put themselves on their country, as the phrase went, chose twenty-four knights, who endorsed the accusation of the twelve men of the hundred, and on that hanged them both.

Consent to be compelled.

The usual method, however, was to try to compel the man to consent to be tried in this way. He was originally placed in rigorous confinement, put in irons, and fed on alternate days on bad bread and stagnant water till he either pleaded or died. See the case of *Hugo*, Y. B. 30 & 31 Ed. I (1303), when he refuses to plead, the judge says that he had better. 'Scilicet uno die manducabitis et alio die bibebitis: et die quo bibitis non manducabitis et e contra: et manducabitis de pane ordeaceo et non salo et aqua.'

The *peine forte et dure*.

But this developed into the extraordinary procedure known as the *peine forte et dure*, which was that he was to be stretched on his back naked, and to have iron laid upon him, as much as he could bear and more; indeed, in 1726, one Burnwater, who was accused at Kingston Assizes of murder, refused to plead, and was pressed for an hour and three quarters with nearly four hundredweight of iron, after which he pleaded not guilty, and was then tried, convicted, and hanged.

In 1658 Major Strangeways was pressed to death in ten minutes, under a wooden frame, with weights on it, placed anglewise over his chest; several persons standing on the frame to hasten his death. A milder form of persuasion, by tying the thumbs with whipcord, was practised in 1734 at the Old Bailey. (Steph., *H. C. L.* i. 300.)

The object of refusing to plead in a felony was, that as, under the circumstances, there was no conviction, no forfeiture took place, and the property of the accused person was thus preserved for his heir. But if the man did put himself upon his country, how was he tried? We know from Bracton something of what took place when the itinerants came round. They came, read their commission, talked about their useful errand, withdrew, and called to them four or six *busones comitatus*, told them their duties, swore them to obey, went back to court, summoned the bailiffs of the hundreds, swore them to choose four knights per hundred, who came and swore to elect twelve other knights, or *liberos et legales homines*. These twelve were scheduled, and, when produced, were sworn. The *capitula* were read to them, and they had to bring their answers on a certain day, amongst other things who were *rettati* or *publicati* of crime, that is, against whom was there a common fame.

The presenting jury.

It did not follow that the presenting jury believed in the report which they handed in, and it is fairly certain that they would omit nothing that they could remember, for the judges of eyre had other sources of information, and notably had before them the sheriff's and coroner's rolls, which told them a good deal that had gone on in the county since the eyre last came, and omissions on the part of the presenting jury were visited with amercements. If *A.* is presented by the jury as *malecreditus*, i.e. as a 'suspect,' the judges question the jury about the grounds of the report, whereupon, says Bracton, someone will perhaps say, or the greater part may say, that their presentment was learned from one of themselves, and this is investigated. The report may at last be traced *ad aliquam vilem et abjectam personam*, one to whom credit is not to be given. If the matter is proceeded with, the person who is presented is asked how he will clear himself, and we will assume that he puts himself on his country.

The jury of deliverance.

What now happens is disputed, for it seems that the view taken by Mr. Justice Stephen, in his *History of the Criminal Law*[1], does not commend itself to Professor Maitland; but probably the presenting hundred jurors are again asked a question. They have been already sworn, and they are now asked to say 'guilty' or 'not guilty,' which is a different question to the question they answered before. If they say 'not guilty,' the man is acquitted; if they say 'guilty,' the four nearest townships are summoned and asked the same question. Sometimes the jury of another hundred is sworn, and asked if they support the verdict of the presenting jury. If they all agree, sentence is passed upon the accused; but the practice must have been unsettled, for we find in the pleas of the county of Gloucester[2] that Marinus of Winchcombe, who was accused of homicide, gave two marks for having an inquisition whether he was guilty or not, and it is said that the jurors of Winchcombe, of Kiftesgate, and of Gretestan, 'dicunt praecise quod non est culpabilis et ideo quietus.' One presumes that he was presented by a Winchcombe jury, and, if that is so, it is clear that the body which presents and the body which *praecise dicit* guilty or not guilty is not identical; but a feeling is growing up that none of those who presented an accused person should be on the inquest which tries him, and this was embodied in a statute of 1352[3].

In Britton, which is a recension of Bracton (1291–2), the functions of the presenting jury are stated to be as above, but the trial comes before other jurors who are directed as to the points which they are to decide. If they cannot agree, they are to be separated and examined why not, and if the greater part of them know the truth, and the other part do not, judgement shall be according to the opinion of the greater part. And if they declare upon their oaths that they know nothing of the fact, 'let those be called which do know it; and if he

[1] Viz. that there were two juries, ii. 258.

[2] No. 52, p. 13.

[3] 25 Ed. III, st. 5, c. 3.

who put himself on the first inquest will not put himself on a new jury, let him be remanded back to penance, till he consents thereto[1].'

Functions of the juries.

It will be noticed that though we have got as far as a jury to present and another to try, both juries give their verdict from their own knowledge of the facts. And 'knowledge' included information which they gathered by informal investigation, so much so that according to Britton the jurors may be strictly examined by the justices as to 'how they are informed of the truth of their verdict,' when it may be discovered to be mere tavern gossip or worse.

Long after this, when the petty jury began to be considered judges of presumptions rather than witnesses, the practice started of bringing in written papers, depositions, informations, and examinations taken out of court. But it was a long time before it was thought necessary to produce evidence to support a prosecution, and longer still before the prisoner was allowed any evidence at all.

How what we call the petty jury, which nowadays traverses the verdict of the grand jury, assumed its present form is quite uncertain. It is suggested by Mr. Justice Stephen that 'the old system of convening something like a county parliament, in which every township was represented by its reeve and four men, fell into disuse and the sheriffs fell into the habit of summoning only a sufficient number of *probi et legales homines* to form a grand jury, and as many petty juries as were needed' to dispose of the cases civil or criminal[2].

The system of accusation which led up to the ordeal is the origin of the grand jury system of our own time, for the grand jury now accuses everyone who is put on his trial before a petty jury. In the book written by Fortescue, *De laudibus legum Angliae* (1460–1470), expressions of an ambi-

[1] Britton, 31, 32.
[2] But see the note (infra) on the Halifax Gibbet-Law.

guous nature occur, which leave it rather doubtful whether the jury is still a witness of fact or a judge of the presumptions raised by the presentment.

A method of trial like this, where witnesses in our sense are rarely if ever called, may do its work well enough in a small community where everybody knows what everybody else is doing; but such primitive conditions do not last for ever, and when they changed, the position of an accused person must have been according to modern notions extremely harsh and difficult. He was not permitted to call witnesses. Queen Mary is said to have directed the judges to allow prisoners to call witnesses in felony: but this was regarded as an indulgence, the rule being that witnesses were not to be heard against the Crown, even in felony, and if such witnesses were called, they were not sworn.

Earlier criminal trials: the position of the prisoner.

Before the great civil war the following were the features in which a criminal trial differed from a criminal trial of to-day. (1) The prisoner was confined more or less secretly, and could not prepare his defence. He was examined, and his examination taken down and used against him. (2) He had no notice of the evidence which was going to be produced against him. (3) He had no counsel either before or at trial. (4) There were no rules of evidence as we understand them. The witnesses were not necessarily confronted with the prisoner, nor were originals of documents produced, the confessions of accomplices were not only admitted, but were regarded as specially cogent. (5) The prisoner was not allowed to call witnesses on his own behalf, and if he was, he could not have done so, for he could not find out what evidence they would give, or procure their attendance. In later times they were not examined on oath even if they were called.

After the civil war some improvements were made. In 1695[1] persons indicted for high treason or misprision of treason were to have a copy of the indictment five days before

[1] 7 & 8 Will. III, c. 3.

trial, and to have counsel, and witnesses upon oath. In 1708[1] the prisoner was allowed to have a list of the witnesses and of the jury ten days before his trial. In 1702[2], in cases of treason *and felony* the prisoner's witnesses were to be sworn as well as the witnesses for the Crown.

A practice also sprung up, the growth of which cannot be traced, by which counsel were allowed to do everything for prisoners accused of felony except address the jury for them. This we find in operation in 1758[3]. On the other hand, at the trial of Lord Ferrers, two years afterwards, the prisoner was obliged to cross-examine the witnesses without the aid of counsel, and even to examine the very witnesses called in order to prove the defence of insanity which he himself was setting up. It must have been an embarrassing position. By 6 & 7 Will. IV, c. 114, all prisoners accused of felony are permitted to make their full defence by counsel.

It is pointed out by Mr. Justice Stephen[4], that the experience of the reigns of Charles II and James II showed that juries might be quite as unjust and tyrannical as the Star Chamber, and that they were equally likely to be unjust on any side in politics. After the Revolution, when one of the great parties of the state had won a decisive victory, the administration of criminal justice became decorous and humane, and as it was mainly left in the hands of private persons between whom the judges were really indifferent, the questions which were involved came to be fully and fairly investigated, it being left to each party to the contest to do the best he could to establish that view of the case in which he was interested.

[1] 7 Anne, c. 27.

[2] 1 Anne, st. 2, c. 9.

[3] *William Barnard's Case*, 19 S. T. 815.

[4] *H. C. L.* i. 426.

NOTE :—The Halifax Gibbet-Law.

We are indebted to Mr. Justice Stephen for preserving the record of two institutions which throw light on the nature of trial by jury in its earliest form. The first is the Halifax Gibbet-Law. Halifax, it is stated in the tract from which Mr. Justice Stephen has taken his information, is part of the Duchy of Lancashire. It has an ancient custom that 'if a felon be taken within their liberty, with goods stolen out of or within the liberty or Precincts of the said Forest, either handhabend, backberand, or confessand, cloth or any other commodity to the value of 13½*d.*, that they shall after three markets or meeting days within the town of Halifax next after such his apprehension, and being condemned he shall be taken to the gibbet and there have his head cut off from his body.'

The procedure was as follows. There were seventeen townships and hamlets within the liberties who chose the most wealthy and best reputed men for their jurors. When a felon was arrested he was brought before the bailiff of the manor of Wakefield. The bailiff detained the prisoner, and summoned the constables of four other towns to require four Fryth burghers from each of those towns to attend at the proper time. If then, when the prosecutors and the felon are brought before the jury and the thing stolen is produced, and 'upon examination they do find that the felon is not only guilty of the goods stolen, but also do find that the value of the goods stolen to be 13½*d.* or above, then is the felon found guilty by the said jury.' The verdict is found upon the evidence of the goods stolen and lying before them, together with his own confession 'which in such cases is always required.' He is then condemned to be beheaded according to the ancient custom. He was sent to prison for a week: there were three market days in every week, he was exposed publicly in the

stocks each market day with the goods on his back or by him. After that he was executed by the gibbet, which was a sort of guillotine.

It seems that the rule that the prisoner must be taken *confessand* was considered to be satisfied if he could not give a satisfactory account of his possession of the stolen goods, 'and doth refuse when asked to tell where he found it or how he came by the same, nor doth produce any witnesses to testify for him how he came by such things, but seeks to evade the truth of the whole matter by trivial excuses, various reports and dubious stories.'

In illustration there is given an account of the trial of three men in 1650, which was the last instance when the custom was enforced. They were accused of stealing certain goods. They were given into the custody of the chief bailiff of Halifax, who summoned the constables of Halifax, Sowerby, Warby, and Kircoat, requiring them to attend each with four men at the High Bailiff's House on April 27 to hear, examine and determine the cases. Sixteen jurors accordingly came, and in a convenient room were brought face to face with the prisoners and the goods. They were charged by the bailiff to make diligent search and inquiry, and the informations against the various prisoners were brought in and alleged. As the jurymen seemed to have some doubt about the reply of one of the prisoners to the information laid against him, they adjourned till April 30, and on April 30 met again, and after full examination and hearing of the whole matter, found two of the men guilty by their own confession, and one not guilty. And the sentence concludes, 'by the ancient custom and liberties of Halifax whereof the memory of man is not to the contrary the said Abraham Wilkinson and Anthony Mitchell are to suffer death by having their heads severed and cut off from their bodies at Halifax Gibbet, unto which verdict we subscribe our names April 30, 1650.'

Now we notice here that the towns are represented each by four men who are brought up by the constable who is the representative of the reeve. They must have questioned the prisoners in order to take their confession, and when one of the prisoners contradicts a statement ascribed to him, they adjourned for three days, probably to make inquiries. After the adjournment they talk it all over again with the prisoners, and get further confessions. The jury not only find the facts, but like the suitors in the old County Court, are the judges, the bailiff only registering their sentences. There is nothing to show that either of the guilty men were taken handhabend or backberand, and what confessand amounted to is extremely doubtful. Perhaps unsatisfactory answers and alleged admissions to other persons than the jurors.

The other institution is the court of the Liberty of the Savoy, which is still in existence. Mr. Justice Stephen was indebted to the late Mr. Bristowe, Q.C., who was the judge of the Nottingham County Court and Steward of the Liberty. The Liberty of the Savoy lies west of Temple Bar, along the bank of the river. It has four wards and a court-leet, which meets twice a year. The court consists of the Steward, who presides, and eight burgesses, two from each of the four wards; a jury for the year, consisting of sixteen, is annually elected at the court. On the day of meeting, the jury are called over and sworn, the oath being the same as is administered to the Grand Jury at the Assizes. They then make their presentments, which are in writing, and signed. If any inhabitant thinks that a neighbour's house is unsafe or disorderly, and he complains verbally or otherwise to the foreman of the jury, the foreman summons his jury. They satisfy themselves in any way they like of the truth of the complaint, and if satisfied they give notice to the offender, and if the nuisance is not abated accordingly, they present the matter next court day. If the jury think that the party presented ought to be fined, four of their number are appointed

to settle the fine. Their finding is conclusive, although they hear no evidence, examine no witnesses, and go through nothing in the nature of a trial. They represent, says Mr. Justice Stephen, that stage in our history at which ordeal and purgation had fallen into disuse, and the substitute for them had not been discovered.

These two survivals take us back, we cannot doubt, a long way, how long we cannot tell. Though they occur in two widely distant parts of the country, they present some features of similarity which are worth observing. In both cases the jury is sixteen, representing four townships or four wards, and in Halifax each panel of four is brought up by the constable of the township, whom we may identify with the mediaeval reeve. In the Halifax case they do not present, that is unnecessary, for the accused is taken *flagrante delicto*, but they say guilty or not guilty; in the Savoy they both present and punish. In neither case are witnesses heard, and in both cases, the jury is left to inform its mind as well as it may.

The four townships play a great part, they present at the hundred and county courts, they are part of the coroner's machinery, their opinion is taken on *culpabilis necne* before the itinerants. Yet all this falls short of proving that they provided our petty jury of twelve. Perhaps, too, it is of importance to notice that in Edward III's reign, when it was a good ground of challenge that an *indictor* was on the jury of deliverance, it became the custom for the accused no longer to put himself on a particular *pais* or hundred, but on the county generally, although hundredors were always on the jury of deliverance. On the other hand, it may be that by this time the petty jury had become firmly established as an institution, and that the alteration was merely to insure a larger choice of impartial people.

CHAPTER XXI

THE CIVIL JURY

BEFORE the introduction of the Inquest, the old methods of proof—not methods of trial—were ordeal, battle, which may be considered as a bilateral ordeal, and oath, all three being appeals to the supernatural.

Compurgation.

The oath procedure usually involved the assistance of oath-helpers or compurgators, and, oddly enough, survived till 1824 (*King* v. *Williams*, 2 B. & C. 538), but it was abolished by statute in 1833 [1].

The Anglo-Saxon witness jury.

Trial by jury, in the sense of trial by those who knew, existed in Anglo-Saxon times, the suitors of the court, who were the judges, being able to swear such of their number, frequently twelve, who knew the facts of their own knowledge. If no one knew there could be no jurors. It was important therefore to have witnesses in civil transactions, and in cases of sale, such witnesses were provided by Anglo-Saxon law [2].

Battle and ordeal.

Apparently in civil cases battle and ordeal were regarded as something analogous to trial by jurors, in default of witnesses who were capable of being jurors. In case of such failure the parties were sworn to the truth, and maintained it with their bodies, *juramentum duelli*, the plaintiff being allowed to make his battle by his body *or* by lawful witnesses. In a 'real' action the demandant could not be a witness and so

[1] 3 & 4 Will. IV, c. 42.

[2] Stubbs, *Sel. Ch.*, p. 72.

could not fight, for the champion must be a competent witness *per visum et auditum*. The tenant, however, could defend himself either in person or by champion.

In case there could be no battle, and there were no witnesses, resort was had to a miracle of God, viz. the ordeal.

The Inquest.

Then came the introduction of the Inquest, of which Henry II took advantage when he invented the Great Assize and the Petty Assizes[1].

The Assizes.

The Great Assize was formed of twelve knights of the district where the land in dispute lay, who had been chosen by four knights in the presence of the justices, these four knights having been chosen by the sheriff.

The Petty Assizes were formed of twelve free lawful men, summoned directly by the sheriff.

The Great Assize.

In a writ of right the defendant might defend himself by battle or he might take advantage of Henry's new provision and put himself on the assize of our lord the king. If he did this, he took out a writ *de pace habenda*, prohibiting the lord, if the suit was in his court, from proceeding, on the ground that the parties had put themselves on the king's assize and had prayed a recognition. Then the demandant prayed another writ directing four lawful knights of the county to choose twelve lawful knights of the vicinage to say upon their oaths who had most right. (Glanv. lib. 2, c. 11.)

If some of the twelve knew and some did not, they rejected the latter till they found twelve who did know; if they disagreed, they added jurors till they got twelve of a mind. These gave their verdict 'per proprium visum suum et auditum vel per verba patrum suorum et per talia quibus fidem teneantur habere ut propriis' (ibid., c. 17).

If the tenant won, he went quit of the demandant for ever, for a suit once determined by the Great Assize could not be reopened. If the demandant won, there issued a writ of execution to the sheriff 'quod seisias N. de una hida &c.

[1] Vide supra, c. vi.

quia idem N. dirationavit terram illam in curia mea per recognitionem, &c. reciting the mode of trial (ibid., c. 20). But neither is this nor the Petty Assize considered to be the original of the civil jury of to-day.

Its office. The Assize, Great or Petty, was summoned to answer a particular question. If the tenant did not wish to put himself on the assize he could 'except' to it and make it 'remain,' i. e. defer it, or perhaps destroy it. He could raise an *exceptio* to the writ, or to the person, or to the assize. For instance, if he excepted to the assize, all the 'operative words' could be disputed, such as *injuste et sine judicio—disseisivit eum—de libero tenemento suo—in tali villa*. All these exceptions were 'out of the assize,' and could not be determined by the recognition of assize. They were subsidiary or collateral, just as any issue of fact arising in the course of the trial might be. Originally these questions, not being cognizable by the assize, were tried by battle, unless the parties agreed to take

The *jurata*. the verdict of a *jurata* on the question of fact, the *jurata* being twelve men of the country side, specially sworn *ad hoc*. In time, the judges compel the litigant to accept the verdict of the country, by saying 'You must take your opponent's offer of a jury or you will lose.' Thus if the defendant has raised an *exceptio*, he is anxious that the question he has raised shall be the one answered. The judges then say, 'why not take the verdict of twelve men on this question? The demandant cannot reasonably object to this method, for he himself has prayed an assize,' and the question is asked. Either a new jury is summoned to answer the defendant's question or by consent the assize is asked to answer it, the assize by consent being turned into a jury, *vertitur in juratam*.

A *jurata* always implied the consent of the parties, and for that reason could not be attainted for a false, i. e. a perjured verdict till 1275[1], when the rule was altered. A similar

[1] Statute of West. I, c. 38.

argument protected the recognitors in the Great Assize in Bracton's time, for the party, it was said, had the choice of battle, and so could not complain

It was not necessary that in all cases the parties should put themselves 'upon the country' as it was called. They might consent 'to put themselves on' one man who knew the facts as in a case reported, Rot. Cur. Reg., No. 140, Pasch. 34 Hen. III m. 17. The defendant asserted that the plaintiff 'assigned' him to pay money to the Earl of Oxford. The plaintiff denied this, *et se de hoc ponit super ipsum comitem.* The defendant does the like. A writ is sent to the Earl who comes and says the assignment was made.

The jurors and evidence.

But we are still a long way off the character of the jury of the present day. Glanvill (*vide supra*) says that the recognitors of the Great Assize may pass their verdict on what their fathers have told them, but that *jurors* in the narrower sense should speak *de proprio visu et audito.* Still we soon find that the country is deciding questions which it cannot answer if it trusts to its own eyes and ears alone, and it is recognized to be the duty of the jurors on receipt of their summons to find out and make inquiries about the things that they are summoned to declare in court. They must collect evidence, and 'certify themselves,' or in the language of the writ *se inde certificent,* and they get about a fortnight to do it in (Britton, ii. 87). In the earliest *Year Books* we see that documents can be put in, to inform the jury [1], and there is not, so far as we know, any rule against the jurors listening to persons whom the litigants produced in court and who could give information, though their evidence was not on oath.

In one class of case, though it is difficult to speak with any certainty, a distinction of a sort seems to have been made between jury and witnesses in our sense. In contracts of sale there were official witnesses, who would be produced in court, though whether they were on the 'jury' is doubtful. In

[1] Pollock and Maitland, *H. E. L.* ii. 625.

cases of debt the plaintiff could support his case by a writing, or by 'suit.'

If the plaintiff produced a writing, usually under seal properly attested by witnesses, the witnesses were called and sworn, and the plaintiff, according to Bracton, put himself *super patriam et testes in carta nominatos*, if the writing was denied. The sheriff summoned the *testes* and the twelve *milites ad recognoscendum*; if the witnesses were dead or out of the realm, the plaintiff put himself *super patriam*. One must not lay too much stress on a phrase, but it looks as though the *testes* and the *patria* are in fact distinguished.

Bracton also mentions another method of proof in such a case, viz. by similarity of impression of the seal, which is 'evidence' in our sense of the word.

The 'secta.'

If the creditor had no writing to show, he had to make a *rationabilem monstrationem* that there was a debt, for Magna Charta said that no one should be put to answer either *per legem* or *per juramentum* upon the 'simple voice' of another. The creditor was thus obliged to produce his *secta* or 'suit,' which did not seemingly offer proof, but merely presumption. They were not summoned as witnesses of fact, but as supporting the oath of their principal. They might be his friends or domestics, and by the time of Edward III so much of a formality was it considered, that though the 'suit' was produced in court it became customary not to examine it. If the plaintiff's *secta* agreed, the defendant was allowed to *vadiare legem*, to wage his law and produce twice as many up to twelve to support him; if they would not swear or did not agree, he lost; if the plaintiff's 'suit' did not agree he was in 'mercy.'

But the defendant was not allowed to 'wage his law' if the plaintiff produced a writing, the proper defence being *nient le fait*, i.e. it is not the defendant's deed.

The *secta*, if the facts are correctly stated, were not 'witnesses' properly so-called; but the production of the charter, the inspection of the seal, and the summoning of the attesting

witnesses is as good evidence as could be required to-day, and was evidence brought forward, it is submitted, to convince the *patria*.

The view that the business of the jury was to speak from their own knowledge died hard. Trial by the vicinage was trial by neighbours who were most likely to know, as Littleton says, *vicinus facta vicini praesumitur scire*; but Fortescue (c. 26), to explain the necessity of having some hundredors on a jury, says that this is to enable the jury to judge of the *credibility of the witnesses*.

According to Fleta, if a civil jury disagreed, they might be afforced, or they might be compelled by starvation to find a verdict, or the judge might take a majority verdict, *ex dicto majoris partis juratorum*. They might also give a verdict *on their belief*, which seems to mark an advance towards the modern view.

Fortescue's description. At any rate, by the time of Henry VI, we find Fortescue the Chancellor describing trial by jury in a civil action, as a trial by evidence, 'each of the parties by themselves or their counsel, in the presence of the court, shall declare and lay open to the jury all and singular the matter and evidence whereby they think they may be able to inform the court concerning the truth of the point in question. That each of the parties has a liberty to produce before the court all such witnesses as they please or can get to appear on their behalf, who being charged on their oaths shall give any evidence that they know touching the truth of the fact concerning which the parties are at issue.'

The hundred and the jury. In the time of Edward III the jury came from the county at large, but it was necessary for two hundredors to be on the jury to 'inform the rest.' The practice must have fluctuated, for in *Y. B.*, 3 Hen. VI, 39 it is said that the jury must come from the hundred, unless there are not enough impartial people, in which case the writ of *decem tales* was awarded to summon jurors from the adjoining hundred.

Up to Elizabeth's time it was a cause of challenge to a juryman that he was not a hundredor (*Waters* v. *Walsh*, Bendl. 363). It was not till 4 & 5 Anne, c. 16, that it was settled that the absence of hundredors should not be a cause of challenge. Up to that time, some were required to be on the jury.

By the 14 & 15 Vict. c. 99, the parties to a civil action became for the first time competent witnesses.

At the present day the general rule is that fact is for the jury, law for the judge. The old popular courts declared the custom and found the facts. But in the fourth year of John a jury says that *non pertinet ad eos de jure discernere*[1]. This distinction is found in the second book of the Decretals, where the direction is, that if the facts are admitted, the question is for the judge alone, if the facts are not admitted, they must be proved by witnesses and not by ordeal or duel.

The modern County Court.

Although the County Court and the County Court jury are institutions well known at the present day, they have no connexion with the old local courts of the eleventh century. The local courts that survived are either held in chartered towns, as the Passage Court of Liverpool and the Chancellor's Court in Oxford, or are Courts of Request founded on Statute.

The modern County Court is the creature of statute. The first County Court Act was passed in 1846, and divided the country into circuits, each with a Court of Record, which had jurisdiction, up to a certain amount, and in specified classes of case. Subsequent statutes have extended these limits, and further extension may well be expected. The judge is appointed, and is removable, by the Lord Chancellor. He sits either alone or with a jury of five, and from him on a question of law raised at the trial, an appeal lies to the High Court. (51 & 52 Vict. c. 43.)

[1] Pl. Abbrev., 40 Linc., 4 John.

CHAPTER XXII

BENEFIT OF CLERGY

It was said in a previous chapter that on the severance of the civil and spiritual jurisdictions the Church claimed the right to try all cases in which a 'clerk' was accused. Although this expression is wide, *clerici rettati et accusati de quacunque re*[1], the claim, in fact, was only pressed with regard to 'felonies,' the King reserved cases of high treason[2], and smaller offences, 'misdemeanours,' the Church took no account of, perhaps because they did not involve the consequences on conviction of death, mutilation, or escheat.

The criminous clerk.

This claim, which for a time was successfully made, produced some remarkable consequences in the sphere of the English Criminal Law.

It may be useful here to make two statements which I think are accurate. Down to the year 1826[3] treason and all felonies except petty larceny and mayhem were punishable with death. All felonies, except *insidiatio viarum et depopulatio agrorum*[4], were 'clergyable' unless taken out of the benefit by statute.

The earliest practice.

The story of 'benefit of clergy' is not easy to tell, for the authorities are rather difficult to understand. But it seems hardly possible to doubt that the construction placed

[1] *Constitutions of Clarendon*, c. 3.
[2] Hale, ii. 350; and cf. 25 Ed. III, st. 3 *de clero*.
[3] 7 & 8 Geo. IV, c. 26. [4] Hale, ii. 333.

by Professor Maitland[1] on the famous third chapter of the *Constitutions of Clarendon* is correct. The accused clerk is to be summoned to the King's Court, thence he is sent to the Ecclesiastical Court, which, if he is convicted, will degrade him. He is then no longer a clerk, and he will be tried and punished in the King's Court as a layman. An official of the royal court will attend the Ecclesiastical Court to see that he does not escape. This view, which seems agreeable to the Canon Law, was opposed by Becket on the ground that by this procedure the man was punished twice over, which was unjust, *nec enim Deus judicat bis in idipsum.*

Its modification.

The view of Becket, whatever we may think of it, would seem to have prevailed after his death.

According to Bracton[2], 'when a clerk of whatever order or dignity is taken for the death of a man or any other crime and imprisoned, and an application is made for him in the Court Christian by the ordinary' the prisoner must be immediately given up without any inquisition being taken. He must be kept in prison till he has duly purged himself, and if he fails to do so he shall be degraded.

Bracton lays it down that even in murder the king's justices could not try clerks till degraded, and as the King's Court could not degrade them, they must be handed over to the bishop. Degradation, he proceeds, is sufficient punishment, *quae est magna capitis deminutio;* but in a case of apostasy, he says a man was degraded and *statim fuit igni traditus per manum laicalem*[3]. But no doubt this was in consideration of the more heinous character of the offence.

Canonical purgation proceeded as follows: the prisoner was tried before the bishop or his deputy and a jury of twelve

[1] *Canon Law in the Church of England,* pp. 132 sq.

[2] Bracton, *De Cor.* II, c. ix. p. 298.

[3] This was the case of an unfortunate deacon 'qui se apostatavit pro quadam Judaea.' This was no doubt an aggravating circumstance, for Fleta, i. c. 35, regards connexion with a Jew or a Jewess as partaking of the nature of bestiality. That sort of person is to be buried alive.

clerks. The prisoner first swore to his innocence, and twelve compurgators swore that they believed him; the evidence on oath was taken *but only on behalf of the prisoner*, the jury of clerks found their verdict on oath, and the prisoner was usually honourably acquitted. Should it happen that he was convicted, he might be degraded, or put to penance, whipped, or imprisoned, but the Church could not pronounce a sentence of blood.

The practice in cases of this nature underwent considerable change, but in the second stage of development it seems that if a clerk committed a murder, the sheriff arrested him. If his bishop desired he could demand him, in which case he was bound to keep him in custody, and to produce him *sub poena centum librarum* before the justices in eyre, when they next came. In the thirteenth century, the clergy complained that this practice kept them years in prison. When the justices at length come, the prisoner is produced and declines to answer, saying that he is a clerk, and the bishop's official demands him. He is handed over, and the justices have no further concern with him.

Secular interference.

But late in Henry III's reign, and certainly early in Edward I's, the practice has changed. Sir Edward Coke attributed the change to a construction placed upon the Statute of Westminster I, c. 2, but the statute says nothing expressly on the subject, and perhaps it was appealed to, in order to confirm an existing practice. Whatever the authority was, the principle was now recognized, that the truth of the charge ought to be investigated by the country and not by a partial tribunal. Accordingly the twelve jurors and the four townships were summoned to say in what character (*qualis*) the prisoner was handed over to his bishop, i. e. guilty or not guilty. This process is not Trial in the proper sense of the word, for the prisoner was not called on to plead. It is an inquisition *ex officio*. And according to Hale[1] an

[1] Hale, *P. C.* ii. 377 sq.

inquisition might be taken on the question whether he was a clerk or no. The inquisition was taken after indictment, that being the moment at which the bishop's claim was usually made. If the inquisition pronounced him guilty, he was handed over to the bishop, but his goods and chattels were forfeited, and his lands seized into the hand of the king till the result of the trial in the Bishop's Court.

This method was, or was alleged to be, a great disadvantage to the prisoner, for in an inquisition *ex officio* he was unable to challenge the jury, and besides, he might possibly be acquitted of the felony if he put himself on the jury *de bono et malo,* and took his chance.

Accordingly in Henry VI's reign, on the ground that it was better for the prisoner to claim his clergy after conviction, he was usually directed to plead to the felony, and put himself on the country. He could thus challenge the jury, have a chance of acquittal, and if found guilty then claim his clergy.

If the clerk cleared himself in the Bishop's Court, he had restitution of his lands, of which the king in the meantime had been taking the profits. But with regard to his goods, a difference was made. If the prisoner claimed and got his clergy on arraignment, that is before conviction, as was the old practice, then if he made his purgation, he had a writ to the sheriff to restore his goods. If, however, he pleaded to the felony, which was the new practice, and stood his trial before the justices, and was convicted, his goods were forfeited irretrievably. The new practice inaugurated in tenderness for the prisoner's interests, undoubtedly benefited the royal revenue.

The justices, moreover, had a discretion; they could hand the convicted clerk over *absque purgatione,* which meant that he was not to be allowed to make his purgation, but was imprisoned in the bishop's prison for life. In that case the king not only had his goods but the profits of his lands during his life.

The privilege was originally confined to those persons who had *habitum et tonsuram clericalem*, but by the statute *De clero*[1] clerks, secular and religious, convicted before the secular justices of treason or felony *touching other persons than the king* or his royal majesty, were allowed the benefit. The expression 'secular clerk' included doorkeepers, readers, exorcists, and subdeacons, and then the courts gradually extended the rule to all who could read, although in the reign of Edward II we find that Shard J. said *quod literatura non facit clericum nisi habet sacram tonsuram*[2]. But by the time of Edward IV the court gave clergy, if the case was clergyable, even though the prisoner had no tonsure, if he could read, and though the ordinary refused him[3]. This official seems to have sat regularly in court, and to have claimed his men 'of course'; he was, at first, the only judge of their competency when the reading test was introduced, but the court soon took the view that the ordinary was but the minister of the court, and if he happened to be absent, the court could give the prisoner his book and hear the man read, even though the ordinary had made a return *non legit*. It appears, though this point is rather obscure, that if a prisoner claimed his clergy on arraignment and read, he went to prison, even if the ordinary did not claim him, but if he put himself on the country *de bono et malo*, and after conviction the ordinary would not claim him, he was hanged[4]. Women were excluded from the benefit till 4 W. & M. c. 9: so also was the 'bigamus,' that is, 'one who hath married two wives or one widow.' He was relieved from his unfortunate position by 1 Ed. VI, c. 12.

Extension of privilege.

Henry VII took the benefit away from certain offences. The distinction now becomes one between offences and not between offenders, and the list was further curtailed by Henry VIII.

Change in character.

[1] 25 Ed. III, st. 3.
[2] 26 Ass. 19; 20 Ed. II.
[3] *Y. B.*, 9 Ed. IV, 28 b.
[4] 12 Ass. 15, 39; 27 id. 42.

The reading test.

The reading test which once sifted out the clerks, now let in the layman. The practice was for the court to refer the prisoner to the ordinary, who certified whether he could read, and if he could, he had the benefit.

In 1487 by 4 Hen. VII, c. 13, everyone convicted of a clergyable felony shall be branded on the brawn of the thumb with M if it is murder, with T if it is theft. If any claimed clergy a second time he should be denied, if not actually in orders, or if he could not produce his letters of ordination or a certificate from the ordinary.

By 18 Eliz. c. 7 it was enacted that persons admitted to their clergy shall not be delivered to the ordinary, purgation having in the meantime been abolished, but after clergy allowed and burning in the hand, shall be set at liberty; but the justice may, to further correct them, imprison them for a period not exceeding one year. The burning was to inform the judge whether the prisoner had had his clergy before. We have preserved in Mr. Baildon's book a charge delivered June 3, 1595, *in camera stellata* by the Lord Keeper to the Justices of the Peace living in or near London, 'devised by the Queen herself,' *inter alia* that benefit of clergy is not to be allowed more than once, nor in case where it is not allowable by law, 'for it is no pietye but wicked pitye.'

By 5 Anne, c. 6 the necessity for reading was abolished.

By 4 Geo. I, c. 11 larcenies might be punished with seven years' transportation instead of branding.

By 19 Geo. III, c. 74 branding was practically though not expressly abolished.

Abolition.

By 7. & 8 Geo. IV, c. 28 benefit of clergy was abolished.

So that, to quote Mr. Justice Stephen, at the beginning of the eighteenth century the position was :—

All felonies were either clergyable or not.

Every one charged with a clergyable felony could have benefit of clergy for the first offence, and clerks in orders for any number.

The benefit was being excused from capital punishment, but till 1779 the prisoner was branded, was sentenced as well to one year's imprisonment, or in a larceny to transportation for seven years.

The number of felonies at common law was small, and all with the exception of petty larceny (i. e. of goods value less than 12*d.*) and mayhem were punished with death.

So till 1487 any one who could read, might commit any number of murders without any other penalty than that of being delivered to the ordinary to make purgation, unless he was delivered *absque purgatione.*

After 1487 any one who could read, could commit murder once without any punishment except branding, and if a clerk in orders he could till 1547 commit any number of them without being branded more than once.

Connected with benefit of clergy was the law of Sanctuary. Sanctuary. Every consecrated church was sanctuary. The malefactor who took refuge there could not be extracted, but it was the duty of the four neighbouring towns to beset the holy place and send for the coroner. He came, parleyed, and the criminal had the choice of standing his trial or abjuring the realm. If he chose the latter he hastened in pilgrim's dress to the port assigned, and left under oath never to return. His lands escheated and his goods were forfeited. If he would do neither, the legal view was that he might after forty days be starved into submission [1].

[1] Pollock and Maitland, ii. 588. There is a picturesque case in *Rot. Cur. Reg.* i. 69, 95, where William Fitz Osbert, who was a troublesome character, had behaved very badly to his brother Robert, and in the absence of Richard I, posed as a patriot leader in the City of London. On being deserted by his followers, he fled to the church of St. Mary le Bow, and went up the tower. The Justiciar, who, unfortunately for William, was archbishop, had no scruples, disregarded the sanctuary, ordered the tower to be set on fire, smoked William out, caught him, had him tried by the Proceres, dragged him to Tyburn, and hanged him. But this conduct was considered unseemly even in an archbishop, and led to his retirement.

Abjuration became obsolete, but various places came to be privileged and 'sanctuary men' were allowed to live there even under statutory regulations (see 27 Hen. VIII, c. 19; 32 Hen. VIII, c. 12).

Sanctuary was abolished by 21 Jac. I, c. 28, but in defiance of the law lingered on for another century, protecting at any rate against the execution of civil process: for there is an Act 8 & 9 Will. III, c. 27, making it penal in sheriffs not to execute their writs in 'pretended privileged places' such as Whitefriars and the Savoy[1].

[1] Stephen, *H. C. L.* i. 491 sq.

CHAPTER XXIII

THE JUSTICES OF THE PEACE

THE 'peace' was practically the criminal law, and to maintain it was one of the prerogatives of the Crown. There was a variety of persons who were charged with the duty; great officers of the Crown, such as the judges of the King's Bench, were *ex officio* guardians or 'conservators' of the peace, some were so by tenure or prescription, some were elected in the county courts, as coroners, some carried extraordinary commissions from the king[1]. The peace and its 'conservators.'

The reign of Edward III was heralded by bloodshed, and the king being a minor, special measures were taken against disorder. The Statute 1 Ed. III, st. 2, c. 16, provided that in every county good men and lawful should be 'assigned to keep the peace' with, however, very limited authority. Statutory regulation.

Three years after they were given the power of receiving indictments, and of keeping the persons indicted in custody till the judges of gaol delivery came round (4 Ed. III, c. 2).

By 18 Ed. III, st. 2, c. 2 *judicial* powers were conferred on them, viz. to hear and determine felonies and trespasses against the peace with others wise and learned in the law, and to inflict punishments reasonably.

By 34 Ed. III, c. 1 separate commissions were provided

[1] The office may possibly have germinated from the frank-pledge system, cp. the *Dooms of Canute*, c. 21; Stubbs, *Sel. Ch.* p. 74; *the Assize of Clarendon*, §§ 1, 8; ibid., 143; and the *Edictum Regium*, A. D. 1195; ibid., 264.

for each county. The qualifications requisite, and the extent of the duties are set forth, and authority given to hear and determine, at the king's suit, felonies and trespasses done in the same county, and to take sureties for good behaviour.

The Court of Quarter Sessions.

In 1388 the number of justices in each commission was fixed at six, not counting the judges of assize, and they were directed to hold their sessions four times a year.

Some later statutes were passed in the next reigns under which the restriction on the numbers was dropped, and by which the dates of the sessions were fixed, but the court formed in 1388 is substantially the Court of Quarter Sessions of to-day. Its times of meeting are now regulated by 11 Geo. IV, 1 Will. IV, c. 70.

The activity of the justices seems not to have been all that was desired, for the Statute 4 Hen. VII, c. 13 recites that the justices of the peace have been negligent and misdemeaning, and directs that complaints must be made to the king or his chancellor, which probably means 'making a Star Chamber matter of it.' In Henry IV's reign they were directed by statute to put down riots, with the sheriff and his 'posse,' and were told that they could only imprison people in the common gaol, which looks as though they had been using their own castles for the purpose.

Its jurisdiction

The jurisdiction of Quarter Sessions rested till 1842 on these statutes and on the commission issued thereunder, which was 'settled' in 1590 and has been in use ever since, which embraced all crimes except treason, subject only to this, that in cases of difficulty a judge of one of the benches or of assize ought to be present. This jurisdiction was exercised and sentences of death were pronounced and executed accordingly. But in practice these powers were gradually dropped, and the limits of jurisdiction are now settled by 5 & 6 Vict. c. 38, which removes the cognizance of treason, murder, capital felony, felony punishable on first conviction with penal servitude for life, and some other specified offences.

By 59 & 60 Vict. c. 57, Quarter Sessions were empowered to try cases of burglary.

The procedure at Quarter Sessions is as at Assizes, by presentment by a grand jury, and trial by a petty jury. The Quarter Sessions also hear appeals by way of rehearing from convictions at petty sessions, and also appeals in Licensing, Rating, and Poor Law matters. and procedure.

Of the Borough Courts of Quarter Sessions, it must suffice to say that from very early times charters of incorporation have been granted to towns, containing grants of courts of varying importance. In such cases the corporation was generally authorized to appoint a judge of their own, usually a recorder, with criminal and sometimes civil jurisdiction. In 1834 these charters and jurisdiction were investigated by a Commission, following on the report of which the Municipal Corporations Act, 5 & 6 Will. IV, c. 76, was passed, empowering the Crown to grant a separate Court of Quarter Sessions to any borough scheduled in the Act, that presents a petition stating the salary that it is proposed to pay the recorder, and the right to appoint the recorder is transferred to the Crown. The recorder is to hold his court four times a year or oftener, and he is the sole judge of the court. Borough Quarter Sessions. The recorder.

In matters of crime the procedure and jurisdiction of such a court is identical with that of the County Quarter Sessions.

The law on the subject was consolidated by the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50).

Courts of Summary Jurisdiction.

Statutes at various times gave power to one or two justices sitting together, to summarily inflict small penalties on unimportant offences, such as trifling nuisances or misconduct, such as profane cursing or swearing[1]. 'Summary jurisdiction' imports trial without either grand or petty jury. Summary jurisdiction.

[1] 19 Geo. II, c. 21.

By 11 Hen. VII, c. 3, justices of assize and justices of the peace may upon information hear and determine, *without a jury*, all offences, except treason, murder, or felony, committed against any statute not repealed.

This Act was repealed in the next reign, but was the beginning of summary jurisdiction in its more extended sense.

The procedure to be used was left very vague, and was at last regulated by 11 & 12 Vict. c. 43.

Petty Sessions.

Under several statutes passed in 1828, 1847, 1849, 1855, 1861, 1871, and 1879, provision was made for dividing counties into petty sessional divisions, and the offences triable thereat and the penalties which may be inflicted, were therein declared.

It is enough to say that, except where by statute one justice sitting alone may act, two justices sitting together have a petty criminal jurisdiction over what may be called police offences and minor breaches of the peace, with a power of inflicting terms of imprisonment of not exceeding six months. Where, however, the offence, other than assault, is punishable with more than three months' imprisonment, the accused has the option of being tried at the Quarter Sessions or Assizes before a jury.

The justices of the peace are appointed by the Crown acting through the Lord Chancellor, who takes the recommendation of the Lord Lieutenant in the case of the county bench.

The stipendiary.

Stipendiary magistrates exist in the metropolis, and other towns in virtue of various statutes. They are appointed by the Crown on the advice of the Home Secretary, and when acting judicially have all the powers of two justices of the peace sitting together. Like the justices of the peace they hold office 'durante bene placito.'

CHAPTER XXIV

THE CORONER

ALTHOUGH the coroner can hardly be said nowadays to discharge an important part in the administration of the criminal law, a duty for which, indeed, being in most cases a medical practitioner or a solicitor, he is not qualified, and although the verdict of a coroner's jury carries little weight, for in that court the ordinary rules of legal evidence are not rigidly observed, yet the office is one of great antiquity, and at one time was a most important piece of the legal system. It is too early yet to say with anything like certainty—if indeed we shall ever know—what connexion, if any, the coroner's inquest had with the petty jury in the Crown Court, but some account can be given of this officer and his duties. **The office of coroner.**

Briefly his duties are now, as they have been since the time of Edward I, to inquire into cases of suspicious death and of treasure trove, and the inquisition of the coroner to-day is as it always has been, a formal accusation of any person found by it to have committed murder or manslaughter, or to have found and concealed treasure, and a person may be tried on such inquisition without further accusation. In practice, however, cases of homicide are always investigated by a magistrate who commits to the Assizes or the Central Criminal Court, where the prisoner is indicted and tried, so that the inquiry before the coroner is superfluous, frequently embarrassing and occasionally mischievous. **His duties.**

It is not certain when coroners were first appointed. The Bishop of Oxford gives 1194 as the date (5 Ric. I), the twentieth article of the eyre of that year being the authority. The learned editor of the *Select Coroners' Rolls* [1] for the Selden Society finds evidence that they existed before that date.

The coroner was, as his name indicates, a king's officer [2], he was elected in the County Court at any rate after the Stat. of West. I, and his name was submitted to the king. His duty was to hold inquests as to the manner of death of those supposed to have died by violence, accident, or in prison, to apprehend the guilty and attach all who knew anything of the circumstances, or with whom the dead man lived, and keep them till the itinerants came, to look after deodands, wreck, and treasure trove, to take 'appeals' and to hear criminal accusations which would presently be tried before the eyre. He was bound to keep a roll or official record of events since the last eyre, which he handed to the justices, who were enabled thereby to check the presentments of the various juries and get a fairly correct view of the local administration. He was the *oculus* of the king.

From the clause in Magna Charta 'nullus vicecomes constabularius vel coronatores . . teneant placita coronae meae,' it may be inferred that he was in the habit of trying royal pleas, and after that date he passed judgement on felons caught in the act. He frequently sat in the County Court with the sheriff, taking civil pleas, and in default of the sheriff executed the royal writ.

He also linked the Royal and Manorial jurisdiction, for it was his duty to be present in privileged baronial courts when felonies were tried, and to watch in the interest of the king, and he could enter 'liberties' when the sheriff was excluded.

[1] Introd. xv–xix to which I am largely indebted.

[2] 'He hath principally to do with pleas of the Crown—and in this light the Lord Chief Justice of the King's Bench is the principal coroner in the kingdom, and may (if he pleases) exercise the jurisdiction of a coroner in any part of the realm.' Bl., *Comm.* i. 345.

In 1276 the Statute de Officio Coronatoris (4 Ed. I. st. 2) gives the coroner's duties, but a comparison with Bracton, *De Corona* (lib. 3, c. 5) suggests that the statute was merely declaratory of the existing practice.

The coroner was not paid though he got certain exemptions, and the office was not sought after.

Subsequent statutes [1] have not affected his duties except in such details as summoning jurors and witnesses, but have provided him with a salary, and he is now appointed by the County Council under the provisions of the Local Government Act (51 Vict. c. 41).

The Coroner's Inquest.

The coroner's jury.

The composition of the coroner's jury or inquest varied. As a rule it was made up in whole or part of representatives of the four neighbouring townships (*villatae*) including that in which the dead body was found.

The most common constitution was twelve men, representing, it is suggested, the hundred, and the reeve and four men from each township, making thirty-two in all. There was no invariable method in which the verdicts were given. They might be given separately, one by the townships, one by the hundred, or each township might give its verdict apart from the others; sometimes the inquest was *per duodecim juratores*, the *duodecim* coming from the townships.

Was it related to the petty jury?

This much is not doubted, but go a little further and we find ourselves in the region of conjecture. We are aware that it was the duty of the four townships to present felonies in the hundred or County Courts, and also that when the judges came round, twelve *juratores* of the hundred had to present persons accused of crime.

When the ordeal was in vogue, the procedure was simple, but when the Lateran Council condemned the ordeal, what

[1] 3 Hen. VII, c. 2; 25 Geo. II, c. 29; 23 & 24 Vict. c. 116.

exactly was the system that took its place? There is a jury of twelve men who are required *praecise dicere* guilty or not guilty. If they say guilty the representatives of the four townships are sworn, and if they agree, sentence is pronounced.

At the present day we are familiar with presentation by a grand jury which corresponds with the presenting jury of the thirteenth century, and with the petty jury which tries the case and says guilty or not guilty. But what we do not know is who were the mediaeval representatives of our petty jury. Were they the second jury of twelve, or were they the representatives of the four townships, or were they neither?

One or two points may be borne in mind. Juries were expected to give their verdict from their own knowledge, the word 'knowledge' being used in a wide sense; the four townships came sometimes to present with the hundred, seemingly when the hundred jury was in doubt; the four townships had already investigated the affair with the coroner, and at some inquests had heard 'evidence' not of jurymen[1], so that they would be in full possession of the circumstances.

The question has been approached in treating of the Criminal Jury[2]; in the present state of our knowledge it must suffice to say that the great authority of the learned editor of the *Select Coroners' Rolls* favours the paternity of the four townships, while Professor Maitland, who once inclined to that view, apparently on further examination thinks the evidence not yet sufficient.

[1] *Select Cor. Rolls*, p. 52.

[2] *Antea*, p. 189.

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